Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSEPH GREENE and MICHAEL SWEENEY,

Petitioners,

—v.—

ERIC HAM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is it constitutionally required to disclose in the nonadversarial arrest warrant application process evidence that merely tends to "impeach" the credibility of witnesses, rather than "negate" guilt?

II. Is the "materiality" of information omitted from an arrest warrant application a legal question for the Trial Judge or a factual question for the jury in a civil rights lawsuit claiming false arrest and malicious prosecution pursuant to an alleged inadequate arrest warrant application?

PARTIES TO PROCEEDINGS BELOW

Plaintiff-Respondent Eric Ham.

New Haven Police Officer Joseph Greene, and New Haven Police Officer Michael Sweeney, Defendants-Petitioners

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CONSTITUTIONAL PROVISIONS

Fourth Amendment to the Constitution of the
United States.....

Fourteenth Amendment to the Constitution of the
United States.....

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

JOSEPH GREENE and MICHAEL SWEENEY
Petitioners

vs.

ERIC HAM
Respondent

On Petition for A Writ of Certiorari
To The Supreme Court for the State of Connecticut

PETITION FOR A WRIT OF CERTIORARI

ORDERS BELOW

The petition challenges an Opinion of the Supreme Court for the State of Connecticut affirming a denial of a motion for posttrial relief after a jury verdict finding false arrest and malicious prosecution based on an allegedly defective arrest warrant application. The Jury Verdict was rendered March 4, 1996. [Appendix 33A.] The Trial Judge's

Memorandum of Decision on posttrial motions was dated May 7, 1997, and issued May 9, 1997. [Appendix 1A.] This appeal timely followed.

The decision of the Connecticut Supreme Court's was officially published May 9, 1999. [Appendix 44A.] A timely Motion for Reargument and/or Reargument En Banc was denied by Order of June 9, 1999. [Appendix 104A.] A timely Motion for Stay was granted June 9, 1999 to enable the timely filing and disposition of this Petition. [Appendix, 105A.]

JURISDICTION

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely on the following:

Fourth Amendment to the Constitution of the United States.

Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the Constitution of the United States.

Citizens rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Eric Ham was arrested for a murder committed January 20, 1991, pursuant to a warrant issued after the defendants submitted a warrant application on February 13, 1991. The charges were subsequently nolle prosequied. This lawsuit challenged the legal adequacy of

the warrant application, asserting federal constitutional violations and state law violations.

There was a verdict in compensatory and federal punitive damages $1.2 million dollars in favor of Mr. Ham, reduced on posttrial motion to $900,000.00. (The four compensatory damage awards of $100,000.00 were combined.)

After the jury verdict, the undersigned entered an Appearance to seek to have the verdict overturned, and for related relief.

Posttrial motions were filed which were denied by the Trial Judge in most respects.

The Trial Judge's Memorandum of Decision on posttrial motions was dated May 7, 1997, and noticed May 9, 1997. [Appendix 1A.] This appeal timely followed.

On appeal, four judges on a panel of the Connecticut Supreme Court upheld a finding of the jury in favor of the plaintiff and a posttrial ruling by the Trial Judge, despite the fact that all such rulings were in turn based on federal judicial rulings rendered subsequent to the submission of the warrant application, respectively, on April 18, 1991, December 3, 1991, and November 15, 1994.

The decision of the Connecticut Supreme Court's was officially published May 4, 1999. [Appendix 44A.]

A timely Motion for Reargument and/or Reargument En Banc was denied by Order of June 9, 1999. [Appendix 104A.]

Mr. Ham had been identified as the shooter by two persons, a Mr. Lynwood Cyprus who knew Mr. Ham, and a Mr. Joseph Timothy Davis who knew Mr. Ham and drove the getaway car.

At the instant civil damage trial for false arrest and malicious prosecution Mr. Cypress was not called to testify and the fact that he gave the incriminating statement was not challenged. Mr. Davis was called to testify, albeit only on rebuttal and after the defense had moved for directed verdict and over defense objection.

Mr. Davis admitted identifying Mr. Ham as the shooter but claimed that he made up the story. He claimed that he had been afraid, the interrogating officer having advised him of his own potential exposure to criminal charges.

Petitioners argued that a directed verdict for the defense was appropriate before Mr. Davis testified and even

after he testified on rebuttal. In ruling on posttrial motions the Trial Judge acknowledged his own doubt about the appropriateness of allowing Mr. Davis to be called only on rebuttal. However, the Trial Judge claimed there was no resulting prejudice since he insisted that he did not take Mr. Davis' rebuttal testimony into consideration in ruling on the posttrial motions.

Petitioners have consistently argued that there existed probable cause as a matter of law, and alternatively that they were entitled to qualified immunity.

Instead, both the Trial Judge and the majority of the appellate panel held that material issues for the jury to resolve were presented by certain omissions from the arrest warrant application, i.e., Mr. Davis had been a reluctant witness, having first denied involvement by Mr. Ham; before implicating Mr. Ham, Mr. Cypress had first given two statements not implicating Mr. Ham; the statements of Mr. Davis and Mr. Cypress incriminating Mr. Ham were contradicted by other persons the court characterized as "independent"; another person already in jail had boasted he committed the crime although he has never been charged.

Also, unknown to the jury at the time of trial Mr. Ham had been charged with another murder, for which he has subsequently been convicted and imprisoned.

REASONS FOR GRANTING THE WRIT

There is a division of opinion within and among the federal and State courts that have ruled on the issues presented by this petition:[1]

(i) whether in a civil rights lawsuit claiming false arrest and malicious prosecution pursuant to an alleged inadequate arrest warrant application evidence that merely tends to impeach the credibility of witnesses is "material"

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[1] Not supporting this petition: Presley v. City of Benbrook, 4 F.3d 405 (5th Jcir. 1993); Velardi v. Walsh, 40 F.3d 569 (2d Cir. 1994); Golino v. City of New Haven, et al., 950 F.2d 864 (2d Cir. 1991), cert. denied sub nom. Lillis, et al. v. Golino, 505 U.S. 1221, 112 S.Ct. 3032, 120 L.Ed.2d 902 (1992), in turn affirming Golino v. City of New Haven, et al., 761 F.Supp. 962 (D.Conn. 1991); Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989); Hindman v. City of Paris, Tex., 746 F.2d 1063, 1067 (5th Cir. 1984); Ham v. Greene, et al., 248 Conn. 508, ___ A.2d ___ (1999).

Supporting this petition: Smith v. Reddy, 101 F.3d 351 (4th Cir. 1996, affirming Smith v. Reddy, 882 F.Supp. 497, 499-500 (D.Md. 1995); Hervey, et al. v. Estes, et al., 65 F.3d 784, 789 n. 5 (9th Cir. 1995); Stigall v. Madden, et al., 26 F3d 867 (8th Cir. 1994); Branch v. Tunnell, 937 F.2d 1282 (9th Cir. 1991)..

and required to be disclosed in the nonadversarial warrant application phase, and

(ii) whether in a civil rights lawsuit claiming false arrest and malicious prosecution pursuant to an alleged inadequate arrest warrant application the "materiality" of information omitted from the warrant application is a legal question for the Trial Court or a factual question for the jury.

This case in particular highlights the need to now address these issues, nearly eight years after they first surfaced in a federal circuit court ruling. Since then, a number of courts, such as the trial court in the instant case and the Connecticut Supreme Court in this and earlier cases as well as some federal courts, have followed that erroneous ruling, like elephants in a circus with their trunks hooked to the tails of those before them, aggravating that unjust ruling with the many that followed.

It has also produced, again as starkly evidenced by the instant case, strained post-hoc rationale and distortions of principles of law in order to uphold the jury verdict,

These types of lawsuits are becoming commonplace whenever an arrestee manages to escape conviction (whether by dismissal, nolle prosqui, or acquittal). If such person is to

be routinely compensated, there should be uniform standards pursuant to legislation.[2]

Discussion.

I. It is not constitutionally required to disclose in an arrest warrant application evidence that merely tends to "impeach" the credibility of witnesses, rather than "negate" probale cause.

So what is new about an accomplice or even eyewitnesses telling inconsistent stories, or about some witnesses contradicting others? Also, who is a truly "independent" or "disinterested" witness?

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[2] Currently pending before the U. S. District Court for Connecticut is Wallen v. DeLullo, et al., Docket No. 3:92CV344 (RNC). The jury returned a verdict of false arrest based on a warrant application for murder and related crimes, with alleged material omissions. All such omissions were "impeaching" evidence. The verdict was for $0 dollars.

The civil trial judge granted cross motions for a new trial and has invited a motion for summary judgment in light of the law we have developed and the conflict in the cases.

The plaintiff had been identified by two persons who knew him and who never recanted their testimony. One of the those persons was the killer who claimed Mr. Wallen hired him, paid him, provided the gun, and drove him to and from the shooting. However, that person subsequently asserted his Fifth Amendment privilege and refused to testify at the criminal trial of Mr. Wallen who was acquitted.

That is classic "impeaching" evidence only. Insert it into the warrant application and probable cause to arrest still exists.

In the criminal jury trial it is the classic role of the jury to resolve such "credibility" issues, not the magistrate issuing the arrest warrant and not even the trial judge in a criminal case.[3]

In the civil case, only a trained and experienced judge can reasonably evaluate what omitted evidence another trained and experienced judge might have found so compelling as to negate guilt and thus lead to the decision to not prosecute, and, alternatively, what error in the warrant application is nevertheless sufficiently reasonable so as to entitle the accused officer to qualified immunity even if probable cause is found to be lacking after "correction" of the warrant application for false or omitted evidence.

Nevertheless, the trial judge and the majority of the Connecticut Supreme Court panel ruled to the contrary,

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[3] Only in criminal cases has the United States Supreme Court held that "materiality" is an issue to be decided by the jury, as part of the prosecution's ultimate burden of proving guilt beyond a reasonable doubt. United States v. Michael Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); also, Joyce B. Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

relying expressly on federal rulings and an earlier state court ruling that in turn expressly relied on federal court rulings, in particular Golino v. City of New Haven, et al., 950 F.2d 864 (2d Cir. 1991), cert. denied sub nom. Lillis, et al. v. Golino, 505 U.S. 1221, 112 S.Ct. 3032, 120 L.Ed.2d 902 (1992), affirming, Golino v. City of New Haven, et al., 761 F.Supp. 962 (D. Conn. 1991), and Velardi v. Walsh, 40 F.3d 569 (2d Cir. 1994), and also Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992). Also, Mulligan v. Rioux, 229 Conn. 716, 643 A.2d 1126 (1994), which in turn relied on federal law including the Golino case.

Elements of false arrest and malicious prosecution -- reasonableness. Reasonableness of police conduct is the central issue in cases alleging false arrest and/or malicious prosecution, more specifically, whether it was reasonable for the charging officer to believe that "probable cause" to arrested existed.[4]

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[4] False arrest. Pierson v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); United States v. Fisher, 702 F.2d 372, 375 (2d Cir. 1983); See v. Gosselin, 133 Conn. 158, 48 A.2d 560 (1946); McGann v. Allen, 105 Conn. 177, 185, 134 A. 810 (1926).

Malicious prosecution. Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); Roesch v. Otarola, et al., 980 F.2d 850 (2d Cir. 1992); Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992); Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980), cert.

However, as discussed in detail infra, that is about where agreement among the judiciary ends.

Standard for challenging the legal adequacy of an arrest warrant application. Under both federal and Connecticut state law the absence of probable cause after the "correction" of a warrant application for "material" false statements or omissions is central to liability for false arrest or malicious prosecution. [5]

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denied, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981); See v. Gosselin, 133 Conn. 158, 48 A.2d 560 (1946); McGann v. Allen, 105 Conn. 177, 185, 134 A. 810 (1926).

[5] An arrest warrant application is validated and does not give rise to civil liability unless

(i) it is first demonstrated that probable cause to arrest no longer exists after "correction" for material omissions or material falsehoods in the warrant application, and

(ii) if it is first determined that the "corrected" application results in the absence of probable cause, then and only then it is demonstrated that any material false statements or material omissions were the result of deliberate knowledge that the reviewing magistrate would be misled or with reckless disregard for that possible consequence.

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); Singer v. Fulton County Sheriff, et al., 63 F.3d 110 (2d Cir. 1995); Cartier v. Lussier, 955 F.2d 841, 845 (2d Cir. 1992); Golino v. City of New Haven, et al., 950 F.2d 864 (2d Cir. 1991), cert. denied sub nom. Lillis, et al. v. Golino, 505 U.S. 1221, 112 S.Ct. 3032, 120 L.Ed.2d 902 (1992); Willocks v. Dodenhoff, 110 F.R.D. 652, 657 (D.Conn. 1986), affirmed, 805 F.2d 392 (2d Cir. 1986); Mulligan v. Rioux, 229

Materiality is not the same as reasonableness. Thus, not every fact is "material" in determining whether the officer acted reasonably.

What is material may vary for many reasons. The term "material" is generally agreed to mean facts that have consequences for the legal issue that must be decided, but it is subject to many variations.

What is "material" will vary depending on (i) the legal issue that must be decided, in this case reasonableness of police conduct, and (ii) whether the particular fact in dispute has consequences for the determination of the legal issue of reasonableness and (iii) even the particular type of proceedings in which the issue is to be determined.[6]

Conn. 716, 643 A.2d 1226 (1994); Outlaw v. City of Meriden, et al., 43 Conn. App. 387, 682 A.2d 112, cert. denied, 239 Conn. 946, 686 A.2d 122 (1996).

[6]Thus, in a civil lawsuit alleging false arrest and/or malicious prosecution, both of which require a decision as to whether or not the officer reasonably believed he or she had "probable cause," what is material is distinct from what is material to the issues in civil and criminal cases of "sufficiency" of evidence to allow the dispute to go to the jury, and proof of "guilt beyond a reasonable doubt."

Furthermore, what is "material" to the arrestee-plaintiff's burden of proving the absence of probable cause may differ, at least in part, from what is "material" to proof of the officer's affirmative defense of qualified immunity.

When determining what evidence is "material" in a particular proceeding it is critical to distinguish between several types of evidence "favorable to the accused."

Evidence "favorable to an accused" includes both "exculpatory" evidence and "impeachment" evidence.[7]

"Exculpatory" evidence has been generally defined as "substantial evidence that would negate the accused's guilt, that is evidence which 'might reasonably be expected to lead to . . . ' a decision not to charge the accused with a "crime".

Thus, "exculpatory" evidence is in nonadversarial proceedings

> substantial evidence that would negate the accused's guilt, that is evidence which "might reasonably be expected to lead to . . . " a decision not to charge the accused with a crime.[8]

Additionally, what is "material" may also vary depending on the type of proceeding at issue -- nonadversarial arrest warrant application process, nonadversarial grand jury, nonadversarial probable cause hearing, adversarial probable cause hearing, trial?

[7] United States v. Bagley, 473 U.S. 667, 683, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); State v. Pollitt, 205 Conn. 132, 142, 149, 531 A.2d 125 (1987) (Trial), quoting from Bagley (Trial).

[8] State vs. Couture, 194 Conn. 530, 557, 482 A.2d 300 (1984), cert. denied, 469 U. S. 1192, 105 S.Ct. 967, 83 L.Ed.2d 971 (1985) (Grand Jury).

The second type of evidence which may be "favorable to an accused" is "impeachment" evidence, that is evidence that might be useful to the defense attorney in cross-examining witnesses or in otherwise presenting the defense case.

All such rulings recognized that in a nonadversarial proceeding including the more secret grand jury only evidence which is "exculpatory" and thus "substantial" evidence which "directly negates" probable cause must be disclosed.[9]

Even subsequent to the rulings in Golino the United States Supreme Court has held that in the nonadversarial context of a grand jury proceeding only evidence which is "exculpatory" need be disclosed and that evidence is "exculpatory" only when it is "substantial evidence which directly negates the guilt of the subject of the investigation." United States vs. John H. Williams, Jr., 504 U.S. 36, 6-70,

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[9] State vs. Couture, 194 Conn. 530, 557, 482 A.2d 300 (1984), cert. denied, 469 U. S. 1192, 105 S.Ct. 967, 83 L.Ed.2d 971 (1985) (Grand Jury); also State vs. Mitchell, 200 Conn. 323, 332 (1986) (Probable Cause Hearing); United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979) (Grand Jury).

112 S.Ct. 1735, 118 L.Ed.2d 352 (1992)(emphasis added) (Grand Jury).

As to adversarial proceedings, both the United States and the Connecticut Supreme Court have held that disclosure is required only for evidence which if disclosed would create "a reasonable probability" that the outcome of the trial would have been different, although what is "material" at such adversarial proceedings often includes "impeaching" evidence.[10]

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[10] Brady vs. Maryland, 373 U.S. U.S. 83 (1963); United States vs. Bagley, 473 U.S. 667 (1985); United States vs. Ciambrone, 601 F.2d 616 (2d Cir. 1979).

> . . . [M]ere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome . . . does not establish "materiality in the constitutional sense,". . . .

State vs. Pollitt, 205 Conn. 132, 142, 149, 531 A.2d 125 (1987), quoting from United States vs. Bagley, 473 U.S. 667, 683 (1985) (emphasis in original in Bagley).

> In otherwords, even at the adversarial trial disclosure must be made only of exculpatory evidence or impeachment evidence that

"The evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonble probability is a probability sufficient to undermine confidence in the outcome. United States v. Bagley, supra, 473 U.S. at 682; State v. Pollitt, supra 205 Conn. at 142-43.

In fact, while so-called "impeaching" evidence is considered "exculpatory" and therefore constitutionally required to be disclosed only for adversarial proceedings even that requirement is subject to the standard

> "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"

Strickler v. Greene, 67 U.S.L.W. 4477, 4484-85 (Decided June 17, 1999) (Internal quotation marks)(citation omitted) (Trial).

In the instant case, relying on rulings from the Second Circuit Court of Appeals, a majority of the panel of the Connecticut Supreme Court has radically departed from those other rulings.

In the instant Ham case, alleging false arrest and malicious prosecution in the nonadversarial context of the arrest warrant application process, both the Trial Judge and the majority of the appellate panel held that material issues in dispute were presented by certain omissions from the arrest warrant application.

In the instant Ham case, a majority of the panel of the Connecticut Supreme Court expressly adopted in part the rulings from Golino and Velardi in the Second Circuit Court of Appeals that information omitted from a warrant application is "material" unless it

> "could not possibly have affected the magistrate's decision to issue the warrant."

[Ham v. Greene, et al., supra, Appendix 76A], quoting Velardi.

The majority of the Ham Supreme Court panel also apparently approved the Trial Judge's yet different and even more stringent standard, i.e., that the omitted information was

> material because they were facts which "would likely be given weight by a person considering the question" of probable cause."[11]

Where are those standards in the law anywhere else or, indeed, anywhere in effect at the time the warrant application for Mr. Ham was submitted -- "would likely be

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[11] [Opinion of the Trial Judge, Appendix, at page 11A; quoted by the Connecticut Supreme Court, Ham v. Greene, et al., Appendix; 73A, 75A-76A].

given weight," "could not possibly have affected the magistrate's decision to issue the warrant?" It simply does not exist, and it certainly was not "clearly established."

The Golino-Velardi-Ham definition and application of "materiality" in the nonadversarial context of the warrant application process is far more expansive than in other cases.

The Golino-Velardi-Ham standard places a greater burden of disclosure on law enforcement than the standards of materiality in nonadversarial proceedings recognized by the United States Supreme Court rulings and other federal courts, and in prior rulings of the Connecticut Supreme Court itself.

The Golino-Velardi-Ham standard also effectively shifts the burden from the arrestee (having to demonstrate that the omitted evidence "would negate" and would "directly negate" the decision to issue the warrant) to the police officer (having to demonstrate that the omitted information "could not possibly have affected the magistrate's decision to issue the warrant").

Where is that standard in the law in effect at the time the warrant application for Mr. Ham was submitted -- "would likely be given weight," "could not possibly have affected

the magistrate's decision to issue the warrant?" It simply does not exist, and it certainly was not "clearly established."

At the very least, it is certain that the cases upon which the Trial Judge and the majority of the Connecticut Supreme Court panel in Ham relied on that did not even exist prior to the February 13, 1991 application for arrest warrant for Mr. Ham so that the petitioner police officers are entitled to qualified immunity because the law was not "clearly established." [See Statement of the Case, supra at p. 3-4, and cases cited above at p. 10-11 and infra at footnote 15, p. 28.]

Petitioners have consistently argued that the existed probable cause as a matter of law, but that in the alternative they are entitled to qualified immunity.

II. In a civil rights lawsuit claiming false arrest and malicious prosecution pursuant to an alleged inadequate arrest warrant application the "materiality" of information omitted from the warrant application should be a legal question for the Trial Judge, not a factual question for the jury.

Who decides what is "material" to the issue of reasonableness, judge or jury or both, and may that also vary depending on the context?

In the instant Ham case both the Trial Judge and the majority of the Connecticut Supreme Court panel concluded that it was for the jury to decide which items of information were material to the warrant application.

We urged that all those omitted items are classic items of "impeachment" evidence only. Insert them into the warrant application and probable cause to arrest still exists.

In contrast, in a civil trial only a trained and experienced judge can reasonably evaluate what omitted evidence another trained and experienced judge might have so compelling as to negate guilt and thus lead to the decision to not prosecute, and, alternatively, what error in the warrant application is nevertheless reasonable so as to entitle the accused officer to qualified immunity.[12]

Even the Velardi panel observed, albeit with an erroneous conclusion that what was at issue was a question of fact,

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[12] In resolving the issue of material omissions from a warrant application the jury is asked not only to decide whether probable cause existed but also to place itself in the position of an experienced and knowledgeable police officer, prosecutor and judge and decide what information does not establish probable cause but nevertheless should have been included in the application. Virtually everything that does not establish probable cause is potentially in that category.

> . . . In such circumstances, we do not review a magistrate's prior determination of probable cause, but rather try to predict whether a magistrate would have found probable cause if he had been presented with truthful information.
>
> . . .

Velardi, et al. v. Walsh, et al., supra, 40 F.3d 569, 574 n. 1 (2d Cir. 1995), citing Golino v. New Haven, supra, 950 F.2d at 872 (emphasis added).[13]

Of course if material facts are themselves in dispute the judge would properly submit Special Interrogatories to the jury in order to resolve the disputed material facts. But

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[13] A jury in the Golino case ultimately exonerated the defendant officers in that case and the City of New Haven after trial. Anthony Golino v. City of New Haven, et al., United States District Court for Connecticut, Docket No. Civil N-88-2 (JAC) (Judgment, July 20, 1993).

In Golino the police failed to get a test of blood found at the crime scene, blood found to be incompatible with that of the accused and the victim, a matter that definitively would have exculpated the accused and negated guilt.

The majority's observation that Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992), included extrinsic objective evidence does not support the majority's conclusion that without such objective evidence the "credibility" of witnesses becomes an issue to be decided by the magistrate evaluating the arrest warrant application.

whether or not the fact, even though disputed, is material is a legal question.

The Courts that have been especially critical of the Golino-Velardi rulings that such facts, which are certainly material to the determination of guilt in a criminal trial, are also material to the determination in this civil trial as to whether or not probable cause to arrest existed when the officers sought the warrant application.

Discussing Velardi in the context of civil review of the adequacy of a warrant application, one such court observed, in part, that observed that in a civil case evaluating the legal sufficiency of an arrest warrant,

> . . . the question of materiality of any omissions or misstatements is a subpart of the qualified immunity inquiry, which is, by its very nature, a threshold one under Anderson [v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).]
>
> Materiality, in this context, is ultimately a question of law as well. . . .
>
> Indeed, the reason for treating the issue as a question of law is even more compelling

> here than in a criminal case, for, if the question were treated as one of fact, the lay jury, at the behest of an acquitted accused, would be applying its hindsight judgment to the question of what role the information in question played in a legally-trained magistrate's overall assessment of probable cause, which is a task that is so much a matter of training, experience, and judgment . . . .
>
> Some courts also have imposed too low a threshold for the claims of intent or recklessness which comprise the . . . [other] prong of Franks. Indeed, Golino is internally inconsistent . . . .

Smith v. Reddy, 882 F.Supp. 497, 499-500 (D.Md. 1995), affirmed partly on other grounds, Smith v. Reddy, 101 F.3d 351 (4th Cir. 1996); also, Hervey v. Estes, 65 F.3d 784 (9th Cir. 1995); Stigall v. Madden, et al., 26 F.3d 867 (8th Cir. 1994); Branch v. Tunnell, 937 F.2d 1282 (9th Cir. 1991).

This particular confusion about the relative roles of judge and jury in deciding what is material in civil lawsuits is itself a variation of a more pervasive confusion about the

relative roles of judge and jury in deciding what is reasonable police conduct in the context of civil lawsuits.

Unfortunately, it is often stated that reasonableness is always a question of fact for the jury to resolve.

Just as in every criminal trial the judge must first make a determination whether there is sufficient evidence to allow the issue of guilt to be presented to the jury, so in every civil case the judge must first make certain threshold decisions.[14]

In fact, in the civil case the judge must decide whether there is sufficient evidence to support one side or the other on a motion for directed verdict before submitting the case to a jury.

This is true even in cases in which reasonableness is an issue.

This is true even in civil cases where the reasonableness of a police officer or other government official is at issue. In fact, in such a case the issue of reasonableness is several times at issue, and each times it is

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[14] Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995), and the cases cited above which have criticized Golino and Velardi come closest to correctly articulating this process.

an issue of law for the judge to decide as a threshold matter before it is presented to the jury.

Thus, before letting the case go to a jury the trial judge must decide whether there is any evidence of unreasonableness.

Also, the judge must decide if there is "sufficient" evidence of unreasonableness to meet the plaintiff's burden of proof.

Furthermore, a civil rights violation will lie only for deliberate misconduct or reckless disregard, but not for mere negligent conduct. So, before letting the case go to a jury the trial judge must decide whether the officer's conduct was sufficiently reasonable so that even if mistaken it could only be classified as negligent, rather than deliberate or reckless.[15]

And even earlier, in a case alleging misconduct by a government employee or official, the judge must decide on motion to dismiss or motion for summary judgment whether the officer's conduct was sufficiently reasonable so that the officer is entitled to be excused from suit and liability on

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[15] Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

grounds of the affirmative defense of qualified immunity even though for such purposes it is assumed that the officer did wrong and did not act sufficiently reasonable for there to have been probable cause.

The latter qualified immunity determination can be based on the legal conclusion that the law was not sufficiently clear at the time of the alleged misconduct, or that the facts were such (perhaps unclear) that a reasonable officer might have made the same error.

Obviously, items which will affect the determination of entitlement to qualified immunity are also "material" to the determination of entitlement to qualified immunity. Whether such items are material is for the judge to decide. Only if items that the judge concludes are material are in dispute will there be a jury issue, and then only requiring a submission of special factual interrogatories. The judge will ultimately determine whether qualified immunity is appropriate, based in part on the factual dispute resolved by the jury but also based on his determination that such disputed fact, however resolved by the jury, is material.

Almost consistently courts have recognized these relative roles of judge and jury with respect to the defense of qualified immunity.[16]

Only in instances where the Court has allowed the jury to decide the ultimate question whether qualified immunity applies and thus effectively also whether the terms in dispute are material has there resulted confusion.[17]

Again, the instant petitioners have consistently argued that there was probable cause as a matter of law, and that alternatively they are entitled to qualified immunity.

Ironically, the Trial Judge in Ham called it a "close case." [Appendix, 14A, 15A.] That is precisely the reason why it must be resolved in favor of the petitioners-police officers.

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[16] Hunter v. Bryant, 502 U.S. 24, 112 S.Ct. 534, 116 L.Ed.2d 589, 595 (1991); Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); Mitchell vs. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995); Warren v. Dwyer, 906 F.2d 70 (2d Cir. 1990), cert. denied, 498 U.S. 967, 111 S.Ct. 431, 112 L.Ed.2d 414 (1990); White v. Frank, 855 F.2d 956 (2d Cir. 1988); Robison v. VIA, 821 F.2d 913 (2d Cir. 1987).

[17] Oliveira v. Mayer, 23 F.3d 642 (2d Cir. 1994).

> . . . [T]he exercise of judgment is what qualified immunity is all about, if the Supreme Court precedent in the area is to be honored. See Harlow v. Fitzgerald, 457 U.S. 800, 818, 819, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 396 (1982). . . .

Smith v. Reddy, supra, 882 F.Supp. at 502.

Also, the Trial Judge's assurance that there could be no prejudice from the testimony of Joseph Timothy Davis because the trial judge did not consider it is not availing. Surely the jury heard it and the judge and the appellate panel evaluated the case as to whether there was sufficient evidence to support the jury's verdict.

Moreover, the courts did not even consider our alternative request for a new trial which should be without the testimony of Mr. Davis whose alleged subjective fear is irrelevant to what the officers knew at the time.

The confusion of burdens is further amplified because the jury is in reality asked to decide the legal question what a trained tria' judge would have considered as in fact negating guit, and that factual finding by the jury of that hypothetical

legal conclusion by a judge is then subjected to appellate review as a finding of fact.

Respectfully submitted,

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APPENDIX

No. _____

_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

_____

JOSEPH GREENE and MICHAEL SWEENEY
Petitioners

vs.

ERIC HAM
Respondent

_____

On Petition for A Writ of Certiorari
To The Supreme Court for the State of Connecticut

_____

APPENDIX

_____

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CV91 032275S	:	SUPERIOR COURT
ERIC HAM	:	J.D. OF NEW HAVEN
VS.	:	AT NEW HAVEN
JOSEPH GREENE, ET AL.	:	MAY 7, 1997

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION TO ARREST JUDGMENT, SET ASIDE VERDICT, JUDGMENT NOTWITHSTANDING VERDICT OR ALTERNATIVELY NEW TRIAL - STATE PUNITIVE DAMAGES

This matter has been extensively briefed and argued by both sides. The court in this memorandum will focus on two major issues and will determine the amount of punitive damages.

The court will not discuss each and every issue raised by the defendants particularly the evidentiary rulings and the appropriateness of allowing rebuttal testimony by the plaintiff. Each one of these matters consumed pages and pages of transcript testimony and argument. The court is not persuaded that it erred in the conclusions it reached and the arguments raised by the defendants now were raised previously at trial. More importantly the court is not

persuaded that if error was made on these matters the error was of sufficient magnitude to change the result of the trial. It is also true that although the court does not in any way mean to imply that the defendants are not pressing these issues, by far the greatest portion of the briefing and oral argument on the post trial matters concerns the issues the court will now discuss.

QUALIFIED IMMUNITY AND RELATED CLAIMS

The defendants strongly argue that their motion should be granted because failure to do so would deprive them of the defense of qualified immunity on the federal claims.

The defendants also argue that there was no basis in law for the jury verdicts returned. Under both state and federal law, an arrest warrant does not give rise to civil liability unless probable cause to arrest no longer exists after correction for material omissions and/or for material falsehoods associated with the arrest warrant affidavit.

Furthermore, the defendants argue that there can be no civil liability unless the jury finds that any material

omission or material falsehoods resulted from intentional action by the police or reckless disregard. The defendants claim there was no basis in the evidence for the jury to reach such a conclusion.

Also, although counsel for the defendants took no exception to the charge as given, it is now claimed that the court erred in failing to give a requested instruction informing the jury as to what was "material" and what was not "material" on the issue of probable cause and whether it could be found.

The Court rejects these positions taken by the defendants and rests its decision on the conclusions and interpretations of law involved in its discussion of the qualified immunity claim. The notion of what is "material", the officer's perspective or position when it was decided to place or not place certain information in the warrant, the decision that must be made by the jury and the standard it must use, are all intertwined in the qualified immunity question. The court concludes the instructions adequately informed the jury of the factors it had to consider, gave them

an operating definition of materiality, and allowed them to conclude, given the facts of this case, whether material omissions in this matter were made intentionaly or with reckless disregard.

As will be discussed, the court concludes the evidence was such that this case should have been submitted to the jury; that being the case the court will not substitute its judgment for that of the jury on these related issues.

An analysis of two cases is important to a resolution of the claims made by the defendants on their motion to set aside the verdict; Cartier v. Lussier, 955 F.2d 841 (CT2, 1992) and Golino v. City of New Haven, et al., 950 F.2d 864 (CT2, 1991). Cartier doesn't mention Golino let alone overrule it so that it seems to make sense to try to harmonize their results for an understanding of federal law on the issue of qualified immunity and the matters just referred to. The Golino court says at 950 F.2d page 870:

> "The qualified or 'good faith' immunity enjoyed by police officers shields them from personal liability for damages 'insofar as their conduct does not violate clearly established

> statutory or constitutional rights of which a reasonable person would have known . . . . . or insofar as it was objectively reasonable for them to believe that their acts did not violate those rights,'"

The real question is what test is applied to determine the scope of the protection just discussed. Cartier says that summary judgment should be granted[1] on the basis of qualified immunity in an arrest warrant case "if the affidavit accompanying the warrant is sufficient, after correcting for material misstatements or omissions, to support a reasonable officer's belief that probable cause existed," id pages 845, citing Magnoti v. Kuntz, 918 F2d 364, 368 (CA2, 1990).

The Golino court poses the problem very succinctly for the judge deciding a motion for summary judgment or weighing a motion for a directed verdict, given the just mentioned premises, see 950 F2d page 870.

> "In order to be entitled to summary judgment on such a defense (qualified immunity), the officer must adduce sufficient facts that no reasonable jury, looking at the evidence most favorable to, the plaintiff could conclude that it was objectively unreasonable for the officer to believe that probable cause did not exist."

The very making of a judgment like this requires the court to look only at mterial facts - facts, in the context of a particular case, that have a bearing on whether an officer has in fact made a reasonable decision as to the existence of probable cause.

In defining what facts are material the Golino court at 950 F2d page 871 said:

> "Whether an item of information is material or not is, in the context of a motion for summary judgment, a mixed question of law and fact. . . The legal component depends on whether the information is relevant to a given question in light of the controlling substantive law. . . The factual component requires an inference as to whether the information would likely be given weight by a person considering the question."

Having ascertained wheat facts are "material" the court in weighing a motion for a directed verdict then decides whetehr those facts which the jury could reasonably be said to have found are such that the court can concludes as a matter of law that no reasonable jury could conclude that it

was objectively unreasonable for the officer to believe that probable cause did not exist.

Legal formulas and references to definitions of "materiality" in the Brady v. Marvland, 373 US 83 (1903); State v. Pollit, 205 Conn. 132, 142 (1987) contexts are not helpful and only add another layer of complexity to an already difficult job. To decide materiality in the context of a case such as this, the facts in question must be examined in light of the particular case. An examination of the facts considered by the court in Cartier and Golino is helpful in defining what facts are material and why the two courts reached different results - not on the basis of the application of different legal standards but on the basis of different types of facts.

In Cartier the plaintiff was arrested as a result of her alleged involvement as the driver of a motor vehicle in a fatal automobile accident. After the charges were disposed of the plainiff brought suit against the arresting officer. The police officer had the statement of a neutral eyewitness that implicated the plaintiff in a fatal auto accident. The officer

also had physical evidence based on the damage to one of the vehicles and an accident reconstruction report that corroborated his determination that the plaintiff was driving and not the passenger who died as a result of injuries suffered in the incident and who the plaintiff said was driving. These are certainly material facts; identity of the actual driver of the car was critical on the issue of probable cause to arrest and certainly this is the type of information that would be given weight by an officer decideing whether he or she had reason to believe there was probable cause for arrest. The facts that the plaintiff argued made the officer's decision unreasonable were statements from her mother that five minutes before the accident the plaintiff left her house and was not driving, the statement of a brother that the plaintiff was not driving, the statement of a friend who changed his story after the warrant for the plaintiff was issued and the fact that hair sample testing was inconclusive. The Cartier court ruled on a motion for summary judgment based on this factual context.

The test applied by Cartier was not different from the one used in Golino. All of the facts just discussed were material. If the probable cause affidavit is corrected for intentional or reckless misstatements and if omissions such as the facts in the plaintiff's favor just discussed are added to the warrant, the court then asks according to Cartier, would no reasonable competent state trooper have sought an arrest warrant? The Cartier court said, reviewing all these facts "reasonable troopers, at the very least, could well disagree whether or not" probable cause existed. That being the case, the court held qualified immunity is established as a defense as a matter of law and the district court should have granted summary judgment. See Cartier, 955 F2d at pp 846-847.

The facts in Golino were of a different type. The material facts there also went to the issue of identity of the person who committed the murder in that case. The court found numerous facts were intentionally withheld from the probable cause affidavit. The court notes most of the neutral eyewitnesses described the killer as thin and clean shaven whereas Golino was heavyset and wore a mustache. The

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Page(s) 10a missing in original document

reasonable jury looking at the evidence in the light most favorable to, and drawing all inference most favorable to, the (arrested person) could conclude it was objectively unreasonable for the officer to believe that probable cause did not exist. 950 F.2d at p. 870.

The reasoning of Cartier and Golino must now be applied to the case before the court. In this case, certainly identity of the person who shot the victim was directly in issue and facts going to establish that were material. Various matters were not included in the probable cause affidavit that were material because they were facts which "would likely be given weight by a person considering the question" of probable cause. Golino, 950 F.2d at p. 871. The plaintiff, Eric Ham, is well over six feet tall. Not included in the warrant is the fact that neutral eyewitnesses to the shooting told the police right after the shooting that the killer was 5'7" or 5'8". The warrant affidavit referred extensively to the statement of one individual who said he observed the shooting from the porch of a house and indicated he identified the plaintiff who was well known to

this witness and who went to school with him. The affidavit did not mention the fact that this same witness had given two previous statements in which he did not identify the plaintiff; in the earliest statement he stated the shooter was 5'5" or 5'6" which corroborated estimates of height given by other witnesses. In that earlier statement, this individual said the shooter had a type of a mask on as did one of the neutral witnesses.

Another individual, Mr. Davis, who was referred to in the affidavit was quoted in the warrant as being with the plaintiff at the time of the shooting. He said that the gun went off accidentally when the plaintiff was playing with it. What is not mentioned in the warrant is that this witness at one point in his statement to the police said the gun held by the plaintiff went off while he was sitting in the car. He later, in response to further police questioning, seems to say the plaintiff got out of the car. But his earlier explicit staetment that the plaintiff remained in the car would very likely be given weight by a person seeking to determine probable cause since such a statement would contradict every

other witness to the shooting as to the location of the shooter and this witness' statement was important corroborative testimony to the only other key witness referred to in the affidavit who had identified the plaintiff as the shooter but who had first given two statements that had not implicated the plaintiff.

Also not mentioned in the warrant was the fact that two jail inmates had reported to the police - one of whom was a relative of the victim - that another individual at the jail (not the plaintiff) had admitted to and bragged about doing the shooting. The police did interview two inmates at the jail and during the trial did give reasons as to why the statements of this person claiming to have done the shooting were not considered credible. He appeared to be a braggart who magnified the seriousness of the charges he was being held on and the amount of his bond. Certainly failure to do further investigation into this matter does not equate with the failure to follow up on investigating leads in the Golino case. But it is true that the simple expedient of interviewing this

person or putting his picture in a photo display for witnesses to the shooting was never taken by the police.

This is a close case but, given the facts referred to and correcting the affidavit as a discussion of those facts, would seem to dictate the court cannot say as a matter of law that it was objectively reasonable for the police to believe there was probable cause for the plaintiff's arrest.

The factor that makes this case more like Golino than Cartier and what distinguishes the latter two cases from each other is this: in Cartier there was fairly unimpeachable evidence from neutral sources that tied the suspect to the crime - an eyewitness with no knowledge of any of the parties who, right after the accident, gives a statement against the plaintiff, independent forensic evidence based on damage to the car and an accident reconstruction report. In a case such as that, contradictory statements from others, especially if they are from relatives or friends, are only "impeachment" material in the Brady v. Maryland, supra, State v. Pollitt, supra sense and the qualified privilege would not be defeated if such facts were not included in the probable cause

affidavit - it would not be unreasonable for an officer to conclude there was probable cause, it could not be said no reasonably competent officer would have sought a warrant.

In Golino as in this case not only was there evidence that the plaintiffs were not involved in the crime but the evidence actually relied on for probable cause statements from others was itself suspect - contradictory or inconsistent statements given by witnesses who actually tied the arrestee to the crime. Then the evidence that contradicts the probable cause conclusion cannot be brushed off as mere "impeachment" material - whatever that means in the context of these cases - but becomes material and a case for the jury to decide. The specter of a ruling such as this limiting the freedom of police activity is always a concern. But it seems to the court that experienced officers in close cases can easily protect themselves by simple expedient of disclosing exculpatory information and considering these factors themselves. This would lead to better arrests and even avoid the powerful cross examination police are sometimes exposed to at trial when it is brought to the attention of the

jury that exculpatory leads and information were not fully considered.

In any event, based on the foregoing reasoning, the court will deny the motion insofar as it raises the qualified immunity defense and the foregoing discussion also leads the court to reject the other arguments raised by counsel. There was enough evidence for the jury to conclude civil liability was established and that given the facts here the officers had the requisite mental intent.

There is another factor that should be mentioned by the court. As has been notede a Mr. Davis was referred to in the warrant as saying he was in a car with the plaintiff and that the shooting occurred when the plaintiff's gun accidentallyt discharged. Mr. Davis was called by the plaintiff as a rebuttal witness. Mr. Davis testified about the nature of the questioning process which resulted in his statement. Objection was made to his testimony; the court exercised its discretion to allow this rebuttal testimony. The court will not review that decision now. However, the testimony was presented after the defendants' motion for

directed verdict. In light of that, it might be considered inappropriate for the court to consider taht testimony on this motion and the court has not done so, Wood v. Bridgeport, 216 Conn. 604, 607 (1990).

However, if it were appropriate to consider this testimony it might provide added reason to deny the qualified privilege claim and the argument that civil liability was not established. The jury could have found taht while Davis was being interviewed at the police station, an officer slammed his hands on the table, indicated he would go away for life, and said the plaintiff was pinning the crime on him, Mr. Davis. One does not have to even reach the issue as to whether these were appropriate questioning procedures to conclude that when such tactics are used the reliability of any such statement implicating a suspect ought, under certain circumstances, to raise doubt for an officer trying to determine the reasonableness of a probable cause conclusion. The circumstances here were that this witness, at least at one point in his interview, located the shooter inside a car where no other witnesses placed him, and he was, as noted, the only

corroborating witness of another witness who had given three statements, only the last of which implicated the plaintiff.

In any event, the court will deny the qualified privilege claim and the other claims previously mentioned and does so without considering the Troy Davis rebuttal testimony.

DAMAGES

(1)

The court agrees with the defendants that the total award for compensatory damages in this case for all counts state and federal was $100,000. In the explanation of the verdict forms the jury was informed that there would be one award for compensatory damages which would be reflected in total on each of the plaintiff's verdict forms in the full amount. That this was the understanding is the fact that there was nothing in the evidence nor was there anything in the closing arguments referring to the evidence to indicate separate types of compensatory damages were or could be claimed for each of the theories of liability.

(2)

The defendants claim also that on the constitutional claims there can be no multiplication of punitive damages "merely because the act or omission of misconduct happens to fortuitously and coincidentally support more than one violation of the law" page 24 of April 29, 1996 brief. Defense counsel's brief argues taht "at most the awards of punitive damages should be limited to one award of $200,000 against each officer - one suich award against each officer for the combined violations of fedeal false arrest and federal malicious prosecution also subject to remittitur" (also at page 24 of brief). The brief seems to concede that the jruy in fact awarded $200,000 against each officer pursuant to the court's instruction so that subject to the remittitur claim the total award for punitive damages on the federal claims should be, if remittitur were not granted, $400,000 - $200,000 for each officer and not $800,000, $200,000 on each federal claim against each of the two officers.

A difficult issue to the court is the one raised by the defendants to the effect that the wrongdoing found by the

jury here constitutes one set of common facts or circumstances and the federal constitutional claims although having different legal elements and thus not subject to merger really arise out of the same set of facts. Thus the defendants argue it would not be fair to award against each officer multiple punitive damages, that is $200,000 for violation of one constitution claim, malicious prosecution, and $200,000 for violation of the second constitutional claim, false arrest. The defendants merely say they can find no authority that would allow such a result - the implication being also that there is no authority forbidding such a result. The plaintiff seems to argue there are two separate constitutional claims, the purpose of punitive damages is to punish transgressors for their wrongs so a multiple damage award is permissible. This on the other hand is somewhat conclusory.

But the court believes what is relevant is the distinction between the two federal constitutional violations. For malicious prosecution [sic] the jury need only find that the police knew or should have known there was no probable

cause for a person's arrest. As to this element a jury could find it established even if a policeman had a sincerely held suspicion a person wsa guilty of a crime but procured his arrest knowing there was no probable cause for it. On a false arrest claim under the facts of this case the jury was instructed and could be taken to have found from their verdict that the officers submitted a warrant to a judge knowing the affidavit contained material omissions or misleading assertions. That s na entirely different and added finding which this court cannot conclude the jury had no right to attach some significance to and thus could not take into account in awarding punitive damages on each federal constitutional claim.

Since this discussion is directly related to the remittitur claim the court will discuss that issue at this point. For reasons set forth in Stebbins v. City of New Britain, 12 Conn. L. Rptr 48 (1994), this court is very reluctant to disturb jury damage awards because such awards are inextricably tied to a plaintiff's right to a jury trial.

The award for compensatory damages here is not exorbitant in light of what conclusions this jury necessarily reached. They knew the charges brought against the defendant were terminated in his favor. They knew he had been incarcerated several months and they had to have concluded there was no basis for the arrest. Such events would necessarily cause pain and suffering to any individual and the court cannot say that the award here based on the consequences suffered by the plaintiff shocks the conscience.

The federal punitive damage award, though large and though both federal claims were based on the same matrix of facts, represented what this jury was representatives fo the community determined should be a consequence for a violation of the defendant's rights. The court believes a jury is uniquely fit to determine damages of this type since they are explicitly told in the charge that such damages should serve as a warning or example for others not to engage in wrongful conduct. A citizen jury is well-equipped to determine the parameters of any such lesson setting function when it involves transgressions they have found a

governmental unit or agent has committed. A trial court should be reluctant to set such damages aside or reduce them given the fact that there are absolutely no guidelines to be used in doing so except the judge's personal predilections as to what would be fair or appropriate. The court declines to remit any of the awards.

(3)

PUNITIVE DAMAGES ON STATE LAW CLAIMS

The jury awarded punitive damages in the state law violation claims and it was left to the court to determine those damages. In Connecticut, punitive damages are limited to a party's litigation costs. In this case, the plaintiff had a retainer agreement with counsel providing that the fee would be 40% of any recovery. In light of the court's instructions on how state and federal punitive damages were to be calculated by the jury the court tends to agree that if the retainer agreement were to be used to determine the amount of state punitive damages there would be a double recdovery or at least the danger of such a recovery being imposed

without any fair way to determine if in fact that were the case.

If cost of litigation were used to determine state punitive damages - hours spent times fair hourly rate - this problem would be avoided. That is in the instructions on punitive damages for the federal constitutional claims the jury was not told that litigation expenses could be taken into account by them.

What do the cases say about calculating the cost of litigation when there is a contingency fee retainer agreement?

In Berry v. Loisseau, 223 Conn. 786 (1992), the trial court had awarded the plaintiff as punitive damages one-third of the plaintiff's recovery based on the client's contingency fee agreement with his lawyer. The trial court [sic] felt bound to take this approach by the provisions of Sec. 57-251c(b) of the General Statutes. Id. p. 830. The Supreme Court held that the trial court improperly concluded that this statute controlled the amount of the plaintiff's punitive damage award. Id. p. 831. The court went on to note that the court had previously upheld punitive damage

awards computed on the basis of a plaintiff's contingency fee agreement with his or her lawyer. See, for example, Markey v. Santangelo, 195 Conn. 76, 80 (1985). But once evidence of a contingency fee agreement is presented the trial court is not required to award punitive damages according to the agreement's terms. Thus, the court said at page 831:

> ". . . [T]he admission of a written fee agreement as evidence of the plaintiff's litigation expenses is in accord with Connecticut practice. . . . Thus, on remand, the trial court may properly consider the terms of the plaintiff's fee agreement in assessing the amount of punitive damages to be awarded."

Id. p. 831. amount of

"May consider" is very far from "must accept."

Thus, in Markey v. Santangelo, supra, the court upheld the trial court's award of punitive damages in the amount of the contingency fee agreement but the court went on to say:

> "We have long held that in a claim for damages 'proof of the expenses paid or incurred' affords some evidence of the value of the services, and if unreasonableness in amount does not appear

> from other evidence or through application of the trier's general knowledge of the subject matter, its reasonableness will be presumed. . . ."

195 Conn. at p. 80.

Before turning to the specific claims and appropriate actual award in this case, the court will make two observations. First, the award for state punitive damages should take into account solely the cost of litigation incurred to advance the state claims. What makes that proposition difficult to effectuate here is that the state and federal claims are inextricably bound not only factually but legally. Thus, federal malicious prosecution is basically the equivalent of state malicious prosecution and, since this case involves a warrant arrest, those two claims involve many issues that arise in the prosecution of the federal false arrest claim. It is hard to parcel out in any meaningful manner how much time an attorney could be said to have spent prosecuting one set of claims as opposed to another set of claims.

Second, it seems to the court that if the plaintiff is to be compensated at some point for litigation expenses in pursuing the federal claims, in light of the just mentioned

factors, the court at the end of these proceedings should be careful not to make a double award for the costs of litigation.

The court has examined the material submitted to it. In light of previous estimates of hourly rates of compensation submitted to other courts by plaintiff's counsel and other members of his firm and positions held in that firm by these respective lawyers and their years of experience, the court concludes a fair hourly rate of compensation would be $150 per hour. There is also a claim that 248.80 hours was the amount of time spent on this trial. The defendants dispute a large portion of the claimed hours. The proper question is what would be the reasonable amount of hours spent in working on the case and what factors should be considered in determining that. The just quoted language from the Markey v. Santangelo case would seem to allow our courts to adopt the practice of the federal courts under Title 42, Sec. 1988 of the U. S. Code. In the case of Blanchard v. Bergeron [sic], 489 U.S. 87, 92 (1989), the court said the following in referring to the guidelines set forth in an earlier case where a contingency fee is involved:

"The Johnson contingency-fee factor is simply that, a factor. The presence of a pre-existing fee agreement may be aid in determining reasonableness. '"The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case."' Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 723 (1987) quoting Johnson, 488 F.2d, at 718. But as we see it, a contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees, and to hold otherwise would be inconsistent with the statute and its policy and purpose.

"As we understand Sec. 1988's provision for allowing a 'reasonable attorneys' fee,' it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more or less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way."

The case of Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (CA 5, 1974) sets out various factors taht courts should take into consideration. There is a discussion

of various categories at pages 717 through 719 with commentary on how to apply the categories which are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due the acceptance of the case; (5)the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undersirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In this case no extensive or complicated pretrial discovery was conducted and the facts were not complex. The jury selection process was fairly lengthy but that is not surprising in a case of this type; the trial was of moderate length and on a few of the days a full seven hour day was not put in by the court and the parties. It cannot be said that novel legal issues were presented except perhaps as to the

post-trial jury matter. There was a contingent fee arrangement here of 40% but the "results otained" on the state claim were only some incalculable portion of the $100,000 compensatory damage award since such an award was also made on the federal claims. The federal punitive damages award cannot be taken into account on the determination of state punitive damages.

The reasonable amount of time for the prosecution of the state claims is, in the court's view, 200 hours. If the hourly rate of $150 is then used the appropriate cost of litigation would then be $30,000. The application of the Johnson factors do not require a different result. This would not preclude the court from awarding additional attorney's fees on the federal claims but that is not before me at the present time.

CONCLUSION

The court will deny the defendants' post trial motions and has determined state punitive damages should be awarded as indicated.

/S/

CORRADINO, J.
5-7-97

STATE OF CONNECTICUT

No. CV91-0322775S	:	SUPERIOR COURT
ERIC HAM	:	J.D. OF NEW HAVEN
VS.	:	AT NEW HAVEN
JOSEPH GREENE AND MICHAEL SWEENEY	:	May 8, 1997

Present: Honorable Thomas Corradino, Judge

JUDGMENT

This action, by writ and complaint in fifteen counts, claiming damages, came to this Court on October 29, 1991; thence to June 3, 1992, when the defendants filed an answer and special defenses; thence to June 9, 1992, when the plaintiff filed a reply to the defendants' special defenses; thence to February 13, 1996, when the plaintiff filed a requires to charge; thence to the same date, when the plaintiff filed a motion in limine with a supporting memorandum of law; thence to February 20, 1996, when the defendants filed a request to charge; thence to February 28, 1996, when the defendants moved for directed verdict after the plaintiff's

case and after their own case, and the Court reserved its ruling on the directed verdict motions; thence to the same date, when the defendant moved for a mistrial; thence to February 29, 1996, when the Court denied the defendants' motion for a mistrial; thence to March 1, 1996, when the defendants moved for directed verdict after the plaintiff's rebuttal, and the Court reserved its ruling on the directed verdict motion; thence to the same date, when, all the evidence having been submitted, the Court committed the action to the jury; thence to the same date, when the jury returned for instruction twice; thence to March 4, 1996, when the jury returned for instruction twice and delivered its verdict as follows:

PLAINTIFF'S VERDICT
United States Constitution Claim--
False and Unreasonable Arrest

On the claim of violation of the Plaintiff's constitutional rights because of false and unreasonable arrest against the Defendant Michael Sweeney, we find for the Plaintiff and award damages as follows:

Compensatory Damages $ 100,000

Nominal Damages $ _____.

If there is an award for punitive damages, indicate the amount:

Punitive Damages $ 200,000.

TOTAL DAMAGES $ 300,000

/s/Paul Stuehrenberg
FOREPERSON

PLAINTIFF'S VERDICT
United States Constitution Claim--
False and Unreasonable Arrest

On the claim of violation of the Plaintiff's constitutional rights because of false and unreasonable arrest against the Defendant Joseph Greene, we find for the Plaintiff and award damages as follows:

Compensatory Damages $ 100,000

Nominal Damages $ _____.

If there is an award for punitive damages, indicate the amount:

Punitive Damages $ 200,000.

TOTAL DAMAGES $ 300,000

/s/Paul Stuehrenberg
FOREPERSON

PLAINTIFF'S VERDICT
United States Constitution Claim--
Malicious Prosecution

On the claim of violation of the Plaintiff's constitutional rights because of malicious prosecution against the Defendant Joseph Greene, we find for the Plaintiff and award damages as follows:

Compensatory Damages $ 100,000

Nominal Damages $ _____.

If there is an award for punitive damages, indicate the amount:

Punitive Damages $ 200,000.

TOTAL DAMAGES $ 300,000

/s/Paul Stuehrenberg
FOREPERSON

PLAINTIFF'S VERDICT
United States Constitution Claim--
Malicious Prosecution

On the claim of violation of the Plaintiff's constitutional rights because of malicious prosecution against the Defendant Michael Sweeney, we find for the Plaintiff and award damages as follows:

Compensatory Damages $ 100,000

Nominal Damages $ _____.

If there is an award for punitive damages, indicate the amount:

Punitive Damages $ 200,000.

TOTAL DAMAGES $ 300,000

/s/Paul Stuehrenberg
FOREPERSON

PLAINTIFF'S VERDICT
Malicious Prosecution

On the claim of malicious prosecution against the Defendant Michael Sweeney, we find for the Plaintiff and award damages as follows:

Compensatory Damages $ 100,000 .

As to punitive damages, we conclude as follows:

Punitive Damages Yes X No _____.

/s/Paul Stuehrenberg
FOREPERSON

PLAINTIFF'S VERDICT
Malicious Prosecution

On the claim of malicious prosecution against the Defendant Joseph Greene, we find for the Plaintiff and award damages as follows:

Compensatory Damages $ 100,000 .

As to punitive damages, we conclude as follows:

Punitive Damages Yes X No _____.

/s/Paul Stuehrenberg
FOREPERSON

PLAINTIFF'S VERDICT

Intentional Infliction of Emotional Distress

On the claim of intentional infliction of emotional distress against the Defendant Michael Sweeney, we find for the Plaintiff and award damages as follows:

Compensatory Damages $ 100,000.

As to punitive damages, we conclude as follows:

Punitive Damages Yes X No _____.

/s/Paul Stuehrenberg
FOREPERSON

PLAINTIFF'S VERDICT

Intentional Infliction of Emotional Distress

On the claim of intentional infliction of emotional distress against the Defendant Joseph Greene, we find for the Plaintiff and award damages as follows:

Compensatory Damages $ 100,000.

As to punitive damages, we conclude as follows:

Punitive Damages Yes X No _____.

/s/Paul Stuehrenberg
FOREPERSON

The Court accepted the verdict.

This action came thence to March 6, 1996, when the defendants filed a motion for extension of time in which to file motions after verdict with a supporting memorandum of law and the Court granted the defendants' motion; thence to March 11, 1996, when the defendants filed a motion to amend basis for grant of additional time in which to file motions after verdict and the Court granted the defendants' motion; thence to April 8, 1996 (motion and order found unstamped, but dated this date), when the defendants filed a motion to extend time in which to file motions after verdict and the Court granted the defendants' motion; thence to April 29, 1996, when the defendants filed a motion to arrest judgment, set aside the verdict, grant a directed verdict or judgment notwithstanding the verdict, or, in the alternative, for a new trial, or in the further alternative, for a remittitur, with a supporting memorandum of law; thence to June 14, 1996, when the plaintiff filed a motion for extension of time in which to file a response to the defendants' motion to arrest judgment, etc.; thence to July 8, 1996, when the plaintiff filed a motion for extension of time in which to file a

response to the defendants' motion to arrest judgment, etc.; thence to July 15, 1996, when the plaintiff filed a motion in opposition to the defendants' motion to arrest judgment, etc., with a supporting memorandum of law; thence to July 18, 1996, when the defendants' filed a motion for extension of time in which to file reply to the plaintiff's motion in opposition to the defendants' motion to arrest judgment; thence to October 29, 1996, when the defendants filed a motion for sanctions; thence to November 5, 1996, when the defendants filed a notice of additional citation; thence to April 22, 1997, when the defendants filed a notice of new, relevant ruling; thence to a later date, when the parties appeared and were fully heard on the defendants' motion to arrest judgment, set aside the verdict, grant a directed verdict or judgment notwithstanding the verdict, or, in the alternative, for a new trial, or in the further alternative, for a remittitur.

The Court, having heard the parties, finds that the defendants' post trial motions should be, and they are, denied. The total award for compensatory damages in this

case for all counts state and federal is $100,000 as the jury was instructed that there would be one award for compensatory damages which would be reflected in total on each of the plaintiff's verdicts forms in the full amount, and there was nothing in the evidence or in the closing arguments referring to the evidence to indicate separate types of compensatory damages were or could be claimed for each of the theories of liability. The Court also finds that the total award for punitive damages on the federal constitutional claims is $800,000 as the Court believes there is a distinction between the two federal constitutional violations and the Court has no guidelines to be used in setting aside or reducing such damages arrived at by a well-equipped jury engaged in a lesson setting function. As for punitive damages on the state law claims, which in Connecticut are limited to a party's litigation costs, the Court believes that if the retainer agreement the plaintiff had with counsel were used to determine the amount of state punitive damages, there would be a double recovery or at least the danger of such a recovery. Thus, the Court finds that the award for

state punitive damages should take into account solely the cost of litigation incurred to advance the state claims. The Court concludes that a fair hourly rate of compensation would be $150 per hour and that the reasonable amount of time for the prosecution of the state claims is 200 hours. The appropriate cost of litigation would then be $30,000. This finding does not preclude the Court from awarding additional attorney's fees on the federal claims but that is not before the Court at the present time.

Whereupon, it is adjudged that judgment shall enter for the plaintiff, Eric Ham, as against the defendants, Joseph Greene and Michael Sweeney, in the amount of $930,000.00.

By the Court,

/S/

_____

Hon. Thomas Corradino, Judge

ERIC HAM v. JOSEPH GREENE ET AL.
(SC 15806)

Borden, Berdon, Katz, Palmer and McDonald, Js.

Syllabus

The plaintiff, who had been falsely accused of murder and held in custody for almost three months, sought damages from the defendant police officers for, inter alia, false arrest, malicious prosecution and violation of his federal civil rights. The defendants raised the special defenses of qualified immunity, governmental immunity, reliance on advice of counsel and contributory/comparative negligence. The jury returned a verdict in favor of the plaintiff against both defendants, and the defendants appealed. Held:

1. The trial court did not abuse its broad legal discretion in denying the defendants' motion for a directed

verdict on their claim of qualified immunity; this court could not conclude as a matter of law that certain material that the defendants had omitted from the warrant application for the plaintiff's arrest could not possibly have affected the magistrate's decision to issue the warrant.

2. The trial court did not abuse its discretion in denying the defendants' motions to set aside the verdict and for judgment notwithstanding the verdict; that court property allowed the jury to resolve the factual disputes concerning police conduct that bore directly on whether the defendants knowingly or recklessly made a false statement or omitted material information that was necessary to a finding of probable cause for the plaintiff's arrest.

(One justice dissenting)

3. The defendants could not prevail on their challenge to the admission of certain rebuttal testimony; the trial court expressly stated in its memorandom of decision that it had not considered that testimony in reaching

its decision on the defendants' motion for a directed verdict.

4. The defendants' challenges to the damages award were unavailing; the defendants failed to preserve their claims that the trial court improperly allowed the jury to consider damages for the plaintiffs lost educational opportunities and improperly permitted awards of multiple punitive damages for the torts of false arrest and malicious prosecution, and the trial court, in denying the defendants' request for remittitur, recognized that the award was sizeable but properly concluded that it did not "shock the conscience."

Argued January 21--officially released May 4, 1999

Procedural History

Action to recover damages for, inter alia, false arrest, malicious prosecution and violations of the plaintiffs civil rights under the state and federal constitutions as a result of alleged misconduct by the defendants, and for other relief, brought to the Superior Court in the judicial district of New

Haven and tried to the jury before *Corradino, J.;* verdict for the plaintiff; thereafter, the court denied the defendants' motion to arrest judgment, to set aside the verdict, to grant a directed verdict or for judgment notwithstanding the verdict, or, in the alternative, for a new trial, or in the further alternative, for a remittitur, and rendered judgment in accordance with the verdict, and the defendants appealed. *Affirmed.*

Martin S. Echter, deputy corporation counsel, for the appellants (defendants).

William S. Palmieri, for the appellee (plaintiff).

Opinion

KATZ, J. The principal issue in this appeal is whether the trial court properly refused to set aside the jury verdict holding the defendants, New Haven police department detectives Joseph Greene and Michael Sweeney, liable for common-law malicious prosecution and false arrest claims and federal civil rights claims brought by the plaintiff, Eric Ham. After the jury found in favor of the plaintiff on each claim, the defendants filed a motion to arrest judgment,

to set aside the verdict, to direct a verdict in their favor or for judgment notwithstanding the verdict, or, in the alternative, for a new trial or a remittitur. The trial court denied their motion and rendered judgment in accordance with the jury verdicts. The defendants appealed from the judgment to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199 (c). We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On January 20, 1991, a light colored station wagon containing two or three African-American males stopped in the vicinity of Sylvan Avenue and Ward and Asylum Streets in New Haven. A black male, approximately five feet five inches to five feet eight inches tall, with a dark complexion and a stocky build, stepped out of the automobile and fired approximately ten shots from a weapon into a crowd of people. He then got back into the vehicle and left the scene. There were two victims of the shooting: Markiest Alexander, age fourteen, who died as a result of the gunshot wounds; and Alfred Brown, age eighteen, who was seriously injured.

New Haven police responded to the scene. Greene was the detective assigned to investigate the shooting and was responsible for coordinating the investigation, locating and interviewing witnesses, retrieving and examining physical evidence, preparing police reports and reviewing reports of other police department members involved in the investigation. Sweeney was the supervisor of the investigation. Numerous witnesses identified through the defendants' investigation were taken to police headquarters that evening and interviewed by the defendants. They recovered, among other items, ten nine millimeter shells from the scene. Among those witnesses who gave separate tape-recorded statements to the defendants within hours of the shooting, were Ronald Hannans, Tashim Thomas, Terry Williams and Troy Carson.

Thomas, who had stood approximately thirty feet away from the shooter, described the shooter to the defendants as a dark skinned black male, approximately five feet eight inches tall, with a stocky build. Hannans told the defendants that he did not recognize the shooter, whom

Hannans described as a black male approximately five feet seven inches tall. Carson told the police that, moments before the shooting, he had seen a car with three black males cruising the area. He described the shooter as a dark skinned black male, approximately five feet seven inches to five feet eight inches tall with a stocky build. The male was dressed all in black. He could not identify the shooter beyond that physical description. Carson knew the plaintiff and told the police that he had seen him near the crime scene with a male named Timothy Davis. He stated that he saw the plaintiff and Davis only after the shooting had occurred and the police had arrived, as the two were leaving the area and as the crowd of onlookers was dissipating. Although Carson knew the plaintiff, he neither identified him as the shooter, nor suggested that the plaintiff was involved. Williams, who gave the same physical description of the shooter as the previous three witnesses, identified the weapon used as a "shiny nine millimeter."

On February 6, 1991, Tremaine Ortiz, another witness to the shooting, also described the shooter as a dark

skinned black male, approximately five feet five inches tall with a medium build. Ortiz verified that the shooter had a uniquely shiny handgun and that a person named "Joe," who fit the description, was known for robbing drug dealers in the area where the shooting occurred.

Shortly after the evening of the shooting, the defendants interviewed Brown, the surviving victim. He told the police that his assailant was a black male, approximately five feet nine inches tall. Brown, who knew the plaintiff from school and the neighborhood, told the defendants that he did not recognize his assailant and, in fact, had never seen him before.

Nearly three weeks after the shooting, on February 6, 1991, the defendants interviewed Lynwood Cypress. Cypress described the shooter as a dark skinned black male, five feet five to five feet seven inches tall, with a stocky build. He confirmed Williams' description of the weapon. Additionally, he advised the defendants that the shooter was the same person who had tried to rob him at gunpoint earlier that evening, shoving the same firearm into his stomach.

Cypress was then transported to the police department where he gave a taperecorded statement in which he repeated his earlier description of the shooter. Cypress believed that the shooter's name was Joe, but did not know the man's full identity. Finally, Cypress told the defendants that he had seen the same person two days after the shooting, but had not seen him in a while and therefore assumed that he was not from New Haven.

In contradiction to his earlier statements, on February 11, 1991, in his third statement to the defendants, Cypress stated that he personally knew the plaintiff and that the plaintiff was the shooter. He witnessed the plaintiff get out of a station wagon and open fire into a crowd of people on Sylvan Avenue. According to Cypress, the plaintiff was dressed in black pants, a black jacket, black shoes and a black hat and was carrying a nickel plated nine millimeter gun that he used to shoot the victims. The plaintiff thereafter got back into the car, which sped away. The vehicle was driven by someone named Joe, whom Cypress also recognized. He did not know the person in the back seat.

The plaintiff and Joe returned moments later and stood in the crowd of onlookers for three to four minutes. According to this statement by Cypress, he and Carson stood close to the plaintiff and Joe, and Carson conversed with them.

Joseph Timothy Davis also gave a statement to the police in which he incriminated the plaintiff. He described how, on the day of the shooting, he and the plaintiff had been driving around in a station wagon that he had rented from someone in the neighborhood. According to Davis, they had stopped at the corner of Sylvan and Asylum Streets to talk with some friends, when the plaintiff began playing with a nine millimeter gun he was carrying. The plaintiff leaned over Davis, and while he was tapping the weapon on the windowsill of the car, the gun discharged, and bullets ricocheted off the ground, striking two boys whom Davis knew from the neighborhood. Thereafter, they left the scene. In contradiction to every other witness as to the location of the shooter, in that statement, Davis reiterated that the plaintiff was seated in the car when the gun was fired. Following police questioning, Davis changed his story

regarding the plaintiff's location, this time placing the plaintiff outside the vehicle during the shooting.

On January 28, 1991, the defendants learned from two inmates, one of whom was a relative of one of the victims, that an individual identified as Joe Covington, who was incarcerated at the New Haven Community Correctional Facility, was claiming responsibility for the shooting of Brown and Alexander. He had boasted to at least five people that he was responsible for the January 20, 1991 shooting. He provided details of the crime and how it had occurred. The defendants sent another policeman to interview two other inmates, George Galberth and Michael Gaetano, but they never interviewed Covington in connection with their investigation. Nor did they assign any other member of the police department to interview him or to show Covington's photograph to any of the witnesses.

On February 11, 1991, the defendants were given information that an individual named Tyrese White had shot Alexander and Brown. On the same date, the defendants received information from another source that an individual

nicknamed "Ears" had had a dispute with Alexander two weeks before the shooting, and had threatened him at that time with a firearm. Neither lead was investigated. The defendants did, however, reinterview Carson that day. He repeated much of what he had already stated to the police on the evening of the shooting. He reiterated that he could not identify the shooter beyond the physical description he had already provided, and that he had seen the plaintiff and Davis leaving the area of the shooting as the crowd of onlookers dissipated, only after the shooting had occurred and the police had arrived.

On February 12, 1991, Greene executed a search warrant at the plaintiffs household. The plaintiff, an eighteen year old black youth, six feet two inches tall, light skinned, and of slim build, weighing 155 pounds, was present at the time of the search. He had extensive contact with Greene, thereby allowing Greene carefully to observe the plaintiff and take note of his physical appearance. Pursuant to the warrant, the defendants seized one black army-type jacket,

one brown empty pistol holster and one empty Remington .22 caliber bullet box.

On February 13, 1991, the defendants prepared and submitted an affidavit in support of a request for an arrest warrant for the plaintiff, charging him with murder in the first degree in violation of General Statutes (Rev. to 1991) § 53a-54a,[1] assault in the first degree in violation of General Statutes (Rev. to 1991) § 53a-59[2] and two counts of criminal

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[1] General Statutes (Rev. to 1991) § 53a-54a provides: "Murder. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

"(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

"(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony."

use of a firearm in violation of General Statutes § 53a-216.[3] Although it did not identify Cypress as the author, the affidavit prepared by the defendants included information obviously taken from Cypress' third statement, the one in

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[2] General Statutes (Rev. to 1991) § 53a-59 provides: "Assault in the first degree: Class B felony. (a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or (2) with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person.

"(b) Assault in the first degree is a class B felony provided any person fould guilty under subdivision (1) of subsection (a) shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

[3] General Statutes § 53a-216 provides: "Criminal use of firearm or electronic defense weapon: Class D felony. (a) A person is guilty of criminal use of a firearm or electronic defense weapon when he commits any class A, B or C or unclassified felony as defeined in section 53a-25 and in the commission of such felony he uses or threatens the use of a pistol, revolver, machine gun, shotgun, rifle or other firearm or electronic defense weapon. No person shall be convicted of criminal use of a firearm or electronic defense weapon and the underlying felony upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information.

"(b) Criminal use of a firearm or electronic defense weapon is a class D felony for which five years of the sentence imposed may not be suspended or reduced by the court."

which he incriminated the plaintiff. Their affidavit also included the contents of the statement by Davis that he had been with the plaintiff when the plaintiff shot the victims. The warrant did not, however, include that portion of Davis' earlier statement placing the plaintiff inside the vehicle when the weapon discharged.

Additionally, the warrant did not include the fact that Thomas, Carson and Hannans, neutral eyewitnesses to the shooting, had told police that the shooter was five feet seven inches or five feet eight inches in height, with a dark complexion and a stocky build. Nor did the affidavit refer to Brown's statement. Although the warrant referred extensively to Cypress' incriminating statement, it failed to even mention the fact that he had given two previous statements, neither of which included an identification of the plaintiff as the shooter. Nor, therefore, did it include a reference to the fact that Cypress had first described the shooter as being a dark skinned black male, five feet five or six inches in height with a stocky build, or the fact that the shooter, known to him only as Joe, had tried to rob Cypress

earlier on the day of the shooting. Further omitted from the affidavit was Cypress' statement that, although he had seen Joe two days after the shooting, he had not seen him for a long time and therefore assumed he was not from the area. Finally, the warrant also failed to mention Covington. Indeed, it did not include any reference to the two prison inmates who had reported to the police that Covington had boasted about being the shooter while providing details about the incident and its victims.

Based upon the affidavit prepared by the defendants, a warrant for the plaintiff's arrest was issued on February 13, 1991. The warrant was executed by the defendants that day, and the plaintiff was arrested and held in custody until May, 1991. On May 9, 1991, the criminal prosecution was nolled by the state because the two witnesses, Cypress and Davis, recanted their earlier statements implicating the plaintiff.[4]

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[4] At trial, Davis described how he had been taken to the New Haven police station where Greene intimidated and threatened him with prosecution. Davis related how Greene had told him falsely that the plaintiff had incriminated him in the shooting. Davis further testified that Greene, in effect, had told him what to say in his tape-recorded statement. Davis testified that in order to ensure his release, Davis had

The charges thereafter were dismissed by operation of law. See General Statutes § 54-142a. [5]

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fabricated a story incriminating the plaintiff, which was included in the warrant affidavit. Davis further explained to the jury that on February 18, 1991, he recanted his statement incriminating the plaintiff. There was also evidence that the defendants were aware of the recantation.

[5] General Statutes § 54~-142a provides in pertinent part: "Erasure of criminal records. . . . (c) Whenever any charge in a criminal case has been nolled in the Superior Court, or in the Court of Common Pleas, if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased. However, in cases of nolles entered in the Superior Court, Court of Common Pleas, Circuit Court, municipal court or by a justice of the peace prior to April 1, 1972, such records shall be deemed erased by operation of law and the clerk or the person charged with the retention and control of such records shall not disclose to anyone their existence or any information pertaining to any charge so erased, provided nothing in this subsection shall prohibit the arrested person or a~ny one of his heirs from filing a petition to the court or to the records center of the Judicial Department, as the case may be, to have such records erased, in which case such records shall be erased. Whenever any charge in a criminal case has been continued at the request of the prosecuting attorney, and a period of thirteen months has elapsed since the granting of such continuance during which period there has been no prosecution or other disposition of the matter, the charge shall be construed to have been nolled as of the date of termination of such thirteen-month period and such erasure may thereafter be effected or a petition filed therefor, as the case may be, as provided in this subsection for nolled cases.....

While § 54-142a has been amended since 1991, no changes were made to subsection (c).

In August, 1991, the plaintiff brought this fifteen count complaint against the defendants, charging them each with federal civil rights claims pursuant to 42 U.S.C. § § 1983 and 1988[6] for false arrest and malicious prosecution and with common-law claims of false arrest, malicious prosecution, intentional infliction of emotional distress and negligence. The defendants raised the special defenses of qualified immunity, governmental immunity, reliance upon

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[6] Title 42 of the United States Code, § 1983 (1994) provides: "Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Colunibia."

Title 42 of the United States Code, § 1983 (1994) provides in relevant part: "Proceedings in vindication of civil rights . . . (b) Attorney's fees

"In any action or proceeding to enforce a provision of sections . . . [§§ 1981 through 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

advice of counsel and contributory and comparative negligence.

The case was tried to the jury, which returned a verdict in favor of the plaintiff as to both defendants. The verdict forms reflect the following awards against each of the two defendants: $100,000 compensatory damages for each of the two federal civil rights claims and $100,000 compensatory damages for each of the two common-law claims. Additionally, as indicated on the verdict forms, the jury awarded the plaintiff $200,000 in punitive damages against each of the two defendants for each of the two civil rights claims. The jury had been instructed by the trial court that there would be one award for compensatory damages and that its verdict form should reflect the total amount it considered appropriate. In the absence of any evidence indicating that separate types of compensatory damages should have been awarded based upon the different theories of liability, the trial court approved the total award of $100,000 for compensatory damages. Turning to the issue of punitive damages, the trial court concluded that there was a

distinction between the two federal civil rights violations and, consequently, approved the total award of $800,000 in punitive damages in connection with those claims. With regard to punitive damages for the common-law claims, the trial court determined that the cost of litigation incurred to advance the state claims was proper. Using a fair hourly rate of $150 per hour for 200 hours of work, the trial court awarded $30,000 additional punitive damages. The trial court denied the defendants' posttrial motions and rendered judgment for the plaintiff in the amount of $930,000. This appeal followed.

I

The defendants argue that the trial court should have granted a directed verdict in their favor on the issue of qualified immunity. We begin with a discussion of our standard of review, followed by an examination of the applicable principles of substantive law.

"Our review of a trial court's refusal to direct a verdict or to render judgment notwithstanding the verdict takes place within carefully defined parameters. We must

consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who were successful at trial; *Bleich v. Ortiz,* 196 Conn. 498, 501, 493 A.2d 236 (1985); giving particular weight to the 'concurrence of the judgments of the judge and the jury, who saw the witnesses and heard the testimony . . . *'Chanosky v. City Building Supply Co.*, 152 Conn. 642, 643, 211 A.2d 141 (1965). The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached their conclusion. *Bleich v.* Ortiz, supra, 500-501; *Pinto v. Spigner,* 163 Conn. 191, 192-93, 302 A. 2d 266 (1972); *Chanosky v. City Building Supply Co.,* supra, 643." *Bound Brook Assn. v. Norwalk,* 198 Conn. 660, 667, 504 A.2d 1047, cert. denied, 479 U.S. 819, 107 S. Ct. 81, 93 L. Ed. 2d 36 (1986); see also *Mather v. Griffin Hospital,* 207 Conn. 125, 130, 540 A.2d 666 (1988).

What is required to satisfy the defense of qualified immunity, which protects public officials from civil actions pursuant to § 1983 arising from the performance of their discretionary functions, is well settled. Although § 1983 on

its face admits of no immunities; Malley v. *Briggs,* 475 U.S. 335, 339, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); the United States Supreme Court has held that the qualified immunity defense protects government officials performing discretionary functions from liability for civil damages insofar as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow *v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). [For purposes of a § 1983 claim,] whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action..... assessed in light of the legal rules that were clearly established at the time it was taken. Anderson v. *Creighton,* 483 U.S. 635, 639, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987) (citing Harlow *[v. Fitzgerald,* supra, 818-19]).

"A subjective inquiry into an official's personal belief is rejected in favor of an objective analysis of what a reasonable officer in [the] defendant's position would

believe. In the context of an allegedly unconstitutional arrest, the objective reasonableness standard bars the defense of qualified immunity [o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable. *Malley v. Briggs,* [supra, 475 U.S. 344-451. Thus, even where the law and the scope of permissible official conduct are clearly established, the defense of qualified immunity will protect a government official if it was objectively reasonable for him to believe his acts were lawful." (Internal quotation marks omitted.) *Cartier v. Lussier,* 955 F.2d 841, 843-44 (2d Cir. 1992).

"Plaintiffs may not unwrap a public officer's cloak of immunity from suit simply by alleging even meritorious factual disputes relating to probable cause, when those controversies are nevertheless not material to the ultimate resolution of the immunity issue." Id., 845. As the *Cartier* court explained, and as the trial court in the present case recognized, in the context of a § 1983 claim, and for purposes of deciding whether to grant a motion for summary judgment or to direct a verdict, the determination of whether

factual disputes are material to the resolution of the issue of qualified immunity is made by applying the same affidavit correction test used in a *Franks* hearing. See *Franks v. Delaware, 438* U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Under that test, factual disputes are extraneous to the resolution of the issue of qualified immunity "'if the affidavit accompanying the warrant is sufficient, after correcting for material misstatements or omissions, to support a reasonable officer's belief that probable cause existed.'" *Cartier v. Lussier,* supra, 955 F.2d 845, quot*ing Magnotti v. Kiintz,* 918 F.2d 364, 368 (2d Cir. 1990). "Only if the corrected affidavit did not support an objective finding of probable cause would the factual disputes be material to resolving the issue of probable cause. In that case, summary judgment [appropriately would] be denied and [the] factual issues involving the immunity doctrine would be submitted to the jury." *Cartier v. Lussier,* supra, 845-46- see also Velardi v. *Walsh,* 40 F.3d 569, 574 (2d Cir. 1994); *Soares v. Connecticut,* 8 F.3d 917, 920 (2d Cir. 1993).

Therefore, before taking the issue of qualified immunity away from the jury as a matter of law, the trial court must first determine that there are no material issues of fact relevant to the existence of probable cause. *Cartier v. Lussier,* supra, 955 F.2d 845-46. In order to be entitled to summary judgment or a directed verdict, "the officer must adduce sufficient facts that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiff, could conclude that it was objectively unreasonable for the officer to believe that probable cause did not exist." Golino *v. New Haven,* 950 F.2d 864, 870 (2d Cir. 1991), cert. denied, 505 U.S. 1221, 112 S. Ct. 3032, 120 L. Ed. 2d 902 (1992); see also *Mulligan v. Rioux,* 229 Conn. 716, 729, 643 A.2d 1226 (1994). "In other words, if any reasonable trier of fact could find that the defendants' actions were objectively unreasonable, then the defendants are not entitled to summary judgment (or a directed verdict]." *Lennon v. Miller,* 66 F.3d 416, 420 (2d Cir. 1995).

In this regard, the materiality of a misrepresentation or an omission is a mixed question of law and fact. Golino *v. New Haven,* supra, 950 F.2d 871. "The legal component depends on whether the information is relevant to the probable cause determination under controlling substantive law. See Anderson *v. Liberty Lobby,* Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). But the weight that a neutral magistrate would likely have given such information is a question for the finder of fact, so that summary judgment is inappropriate in doubtful cases. See Golino *[v. New* Haven, supra, 871-72]; see also *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 450, 96 S. Ct. 2126, 213233, 48 L. Ed. 2d 757 (1976). Nonetheless, if the evidence, viewed in the light most favorable to the plaintiffs, discloses no genuine dispute that a magistrate would have issued the warrant on the basis of the 'corrected affidavits,' then under the ordinary standard for summary judgment, see *Turtur v. Rothschild Registry Internation, Inc.,* 26 F.3d 304, 309 (2d Cir. 1994), a qualified immunity

defense must be upheld." *Velardi v.* Walsh, supra, 40 F.3d 574.

In accordance with this well established precedent, the trial court in the present case, citing *Golino v. New Haven,* supra, 950 F.2d 870, first concluded that the defendants were entitled to qualified immunity as a matter of law only if, on the facts found, their conduct either did not violate "'clearly established . . . rights of which a reasonable person would have known,'" or "it was objectively reasonable for them to [have believed at the time of the challenged action] that their acts did not violate those rights . . . ." The right of an individual not to be subjected to arrest without probable cause has long been clearly established; id.; and was not disputed by the parties. Thus, the questions in this case were whether there were material factual disputes, and whether, applying the *Franks* test, the affidavit accompanying the warrant would have been sufficient, after correcting for material misstatements or omissions, to support a reasonable officer's belief that probable cause existed. As the trial court, citing to Golino, correctly

explained, following any Franks corrections, in order for the defendants to prevail as a matter of law on the special defense of qualified immunity, it was incumbent upon them to prove that no reasonable juror, looking at all the evidence in the light most favorable to the plaintiff, could conclude that it was objectively unreasonable for the defendants to believe that probable cause did not exist.

Applying this well settled law to the facts of the present case, the trial court began with an evaluation of the material facts. Again, in deciding what facts were material, the court explained, quoting Golino: "Whether an item of information is material or not is, in the context of a motion for summary judgment, a mixed question of law and fact. . . . The legal component depends on whether the information is relevant to a given question in light of the controlling substantive law. . . . The factual component requires an inference as to whether the information would likely be given weight by a person considering that question." (Citations omitted.) Id., 871.

Implementing this test, the trial court first concluded that the identity of the shooter was directly in issue. Then it turned to the facts relating to that issue that had a bearing on whether the defendants had made a reasonable decision as to probable cause. The court then cited to the various factors that had been omitted from the affidavit. Specifically, the court noted that several neutral eyewitnesses to the shooting had told the police that the shooter was five feet seven inches tall, as compared to the plaintiff, who was well over six feet. The defendants also had failed to mention that the one unidentified person, referred to extensively throughout the affidavit-who knew the plaintiff, had witnessed the shooting, and had identified the plaintiff as the shooter-earlier had given two other statements in which he had described the shooter as someone he did not know, who was five feet five inches or five feet six inches tall and who wore a mask. The court noted that this description was corroborative of a statement by another witness to the shooting (Hannans), which also had been omitted from the affidavit. The trial court next examined Davis' statement. Davis, who had been

quoted extensively in the affidavit, had first told police that the plaintiff had fired the gun from inside the car. That earlier statement did not find its way into the affidavit. Because this statement "would very likely [have been] given weight by a person seeking to determine probable cause since such a statement would [have] contradicted every other witness to the shooting as to the location of the shooter and this witness' statement was important corroborative testimony to the only other key witness referred to in the affidavit who had identified the plaintiff as the shooter but who had first given two statements that had not implicated the plaintiff," the trial court concluded that such information was relevant to the probable cause determination under controlling substantive law. See *Anderson v. Liberty Lobby, Inc.*, supra, 477 U.S. 248.

Drawing upon similarities to the facts of Golino,[7] the trial court concluded that, "not only was there evidence that

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[7] In *Golino v. New Haven,* supra, 950 F.2d 872, the trial court concluded that numerous facts had been withheld from the affidavit. In denying the defendants' motion in the present case, the trial court referred to some of the omitted facts in Golino, in particular: "[M]ost of the neutral eyewitnesses described the killer as thin and clean shaven whereas

the [plaintiff was] not involved in the crime but the evidence actually relied on for probable cause statements from others was itself suspect-contradictory or inconsistent statements given by witnesses who actually tied the arrestee to the crime." Under such circumstances, the court determined that more than "mere impeachment material" was at stake,[8] and that the various matters that had not been included in the affidavit "were material because they were facts which

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Golino was heavyset and wore a mustache. The person who said the killer had a mustache identified someone else and not Golino. The prime accuser made statements inconsistent with those she was referred to as having made in the warrant affidavit and recanted the statements attributed to her in the affidavit. Prints the police believed belonged to the killer did not match Golino. The police knew the killer's blood type but declined to test Golino for his blood type [Id., 871-721."

[8] The trial court distinguished the present case from *Cartier v. Lussier*, supra, 955 F.2d 841, wherein there "was fairly unimpeachable evidence from neutral sources that tied the suspect to the crime-an eyewitness with no knowledge of any of the parties who, right after the accident, gives a statement against the plaintiff, independent forensic evidence based on damage to the car and an accident reconstruction report. In a case such as that, contradictory statements from others, especially if they are from relatives or friends, are only 'impeachment' material in the Brady v. Maryland [373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] *State v. Pollitt* [205 Conn. 132, 531 A.2d 125 (1987)] sense and the qualified privilege would not be defeated if such facts were not included in the probable cause affidavit. . . ."

'would likely be given weight by a person considering the question' of probable cause."

We agree with the trial court that these omissions materially contributed to the objective basis for finding probable cause. As we have stated, "[a]lthough the ultimate determination of whether qualified immunity applies is ordinarily a question of law for the court, when, as in this case, there are unresolved factual issues material to the applicability of the defense . . . resolution of those factual issues is properly left to the jury. *Oliveira v. Mayer,* 23 F.3d 642, 649 (2d Cir. 1994); War*ren v. Dwyer,* [906 F.2d 70, 76 (2d Cir.), cert. denied, 498 U.S. 967, III S. Ct. 431, 112 L. Ed 2d 414 (1990)]." (Emphasis in original.) Mulligan *v.* Rioux, supra, 229 Conn. 736. "[Wlhether a magistrate would have found probable cause if he had been presented with *[material]* truthful information . . . is a question of fact rather than of law." (Citation omitted; emphasis added.) *Velardi v. Walsh,* supra, 40 F.3d 574 n.l.

The trial court in the present case finally concluded that, although this was a "close case," it could not decide as a

matter of law that there existed "no genuine dispute that a magistrate would have issued the warrant on the basis of the 'corrected affidavits . . . .'" Id., 574; see *Turtur v. Rothschild Registry International,* Inc., supra, 26 F.3d 309. We cannot conclude as a matter of law that the probable cause calculus would not have been different or that the omitted information "could not possibly have affected the magistrate's decision to issue the warrant." Velardi *v. Walsh,* supra, 40 F.3d 574. Accordingly, after a thorough review of the extensive evidence presented in this case, we reject the defendants' claim that the trial court abused its broad legal discretion in declining to set aside the jury's verdict. *Palomba v. Gray,* 208 Conn. 21, 24,543 ~A.2d 1331 (1988).

II

In this next issue on appeal, the defendants claim that the trial court improperly denied their motions to set aside the verdict and for judgment notwithstanding the verdict. This claim is, to a large degree, intertwined with the first claim. Distilling the defendants' claims to their essence, and putting aside the defendants' complaint, raised for the first

time in this appeal, that the trial court's instruction on materiality was deficient; see footnote 12 of this opinion; they argue that there was no basis in law for the verdicts because, "[u]nder both state and federal law, an arrest warrant does not give rise to civil liability unless probable cause to arrest no longer exists after correction for material omissions and/or for material falsehoods associated with the arrest warrant affidavit" and because there was no basis in the evidence for the jury to have concluded that any such material omissions or falsehoods resulted from their intentional action or reckless disregard.

In accordance with the aforementioned discussion, we conclude that the trial court acted within its discretion in allowing the jury to consider the constitutional claims of false and unreasonable arrest and malicious prosecution. There were factual disputes concerning the police conduct that bore directly on whether the defendants had knowingly or recklessly made a false statement or omitted material information that was necessary to a finding of probable cause. The jury was properly instructed to resolve these

factual disputes and to decide whether, based upon its findings, the information omitted or misrepresented would likely have been given weight by the magistrate considering the request for the warrant.[9] The jury's verdicts reflect its answer that, more probably than not, no warrant would have issued based upon the corrected affidavit. Considering the evidence, including reasonable inferences that may be drawn therefrom, in the light most favorable to the plaintiff, and giving particular weight to the concurrence of the judgments of the judge and the jury, who observed the witnesses and heard the testimony, we cannot conclude that the trial court abused its discretion in refusing to set aside the verdict and

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[9] The defendants argue that, with regard to the issue of probable cause, because a judge had signed a warrant authorizing the plaintiff's arrest, "only the malicious prosecution claim may even be considered. . . . This is incorrect. A review by a trier of fact of the corrected affidavit differs from a probable cause determination by a magistrate on the basis of affidavits that contain material omissions. The magistrate's signature does not, in and of itself, insulate the defendants when there is a genuine dispute about material facts. Consequently, it is proper for the jury to evaluate the issue of probable cause as it relates to the false arrest claims.

direct judgment in the defendants' favor. *Mather v. Griffin Hospital,* supra, 207 Conn. 130.[10]

III

The defendants next raise nine additional claims that pertain to their liability. Seven of these claims have not been briefed adequately,[11] and one was not preserved at trial for

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[10] With regard to the common-law claims of malicious prosecution and intentional infliction of emotional distress the defendants argue that this court in *Mulligan v. Rioux,* supra, 229 Conn. 727-30, improperly distinguished between standards for qualified immunity to common-law claims of malicious prosecution and civil rights claims of malicious prosecution. Specifically, the defendants expressly invite this court to abandon its recent decision and to adopt instead the objective reasonableness standard in the context of state law claims arising out of allegedly unlawfull arrests and prosecutions. We decline their invitation.

[11] The defendants have claimed the following improprieties: (1) the trial court's admission of the statements of Alfred Brown (a victim of the shooting) and the testimony and statements of George Galberth and Michael Gaetano (the two inmates who heard Covington's incriminating statements) was improper; (2) the search warrant was improperly admitted into evidence because it undoubtedly confused the jury; (3) the court improperly refused to allow police officer Andrew Faggio to testify about Davis' statement to him that a contract was out on his life; (4) the court improperly allowed into evidence the sales slip for the automobile claimed to have been used in the shooting; (5) the court improperly limited the scope of the plaintiff's cross-examination regarding statements he had made in connection with his arrest for failsely reporting an incident; (6) the court improperly disallowed the defendants to offer a statement by Ortiz that he knew the plaintiff to be the shooter but that he would not identify him because he wanted to get revenge on the plaintiff himself, and (7) the trial court improperly refused to grant

appellate review.[12] We consider and reject the one claim that is properly before this court.

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the defendants motion for mistrial after Davis "blurted out" before the jury that he had taken a polygraph test.

These claims were briefed in as equally a perfunctory a fashion as they have been stated herein. Rather than analyze the trial court's reasoning with regard to any of these claims, the defendants merely assert, in a conclusory manner, that the trial court acted improperly. Consequently, they do not merit review. Practice Book § 67-4; *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 38, 717 A.2d 77 (1998) (issues not adequately briefed may be deemed abandoned); see also *Latham & Associates,* Inc. v. *William Rveis Real Estate, Inc.*, 218 Conn. 297, 300, 589 A.2d 337 (1991); Gaynor v. Union *Trust Co.*, 216 Conn. 458, 482, 582 A.2d 190 (1990).

[12] The defendants claim that the trial court failed to give proper guidance regarding the meaning of exculpatory information and materiality. This claim was not raised properly at trial. The defendants expressly informed the court, following its charge to the jury, that they had no objections to the charge. As we have repeatedly stated, issues not properly raised before the trial court will ordinarily not be considered on appeal. Practice Book § 60-5. "We have referred to the policy reasons underlying the preservation requirement on several occasions. The policy serves, in general, to eliminate the possibility that: (1) claims of error would be predicated on matters never called to the attention of the trial court and upon which it necessarily could have made no ruling in the true sense of the word; and (2) the appellee . . . would be lured into a course of conduct at the trial which it might have altered if it had any inkling that the [appellant] would . . . claim that such a course of conduct involved rulings which were erroneous and prejudicial to him." (Internal quotation marks omitted.) *Willow Springs Condominitim Assn., Inc. v. 5eventh BRT Development Corp.*, 245 Conn. 1, 48, 717 A.2d 77 (1998).

Recognizing the problem of preservation, the defendants claim that "[t]his emission by the court is plain error." We reject this claim. First, "[o]nly in the most exceptional circumstances will this court

The defendants claim that the trial court improperly allowed Davis to testify as a rebuttal witness. They recognize that whether to allow rebuttal testimony is a matter of discretion. See *Shaham v. Copparelli,* 219 Conn. 133, 134, 591 A. 2d 1269 (199 1). Nevertheless, they claim that it was improper in this case to allow the testimony because "the plaintiff could not have prevailed on a motion for directed verdict at the close of the plaintiffs case without such testimony." We disagree.

After Sweeney testified regarding Davis' interview, the plaintiff called Davis as a rebuttal witness, over the defendants' objection, to describe how the defendants had threatened him and had told him falsely that the plaintiff had implicated him in the shooting. This testimony did indeed follow the defendants' motion for a directed verdict. The trial court, however, deferred ruling on that motion until after the jury had returned with its verdict. The trial court, citing

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consider a claim that was not raised in the trial court." Id., 48 n.42. Second, the defendants do not brief why the claim merits such extraordinary review. Rather, once again, the brief provides but a summary statement supporting the claim.

to Wood *v. Bridgeport*, 216 Conn. 604, 607, 583 A.2d 124 (1990), expressly stated in its memorandum of decision on the posttrial motions that it had not considered Davis' rebuttal testimony in reaching its decision. Therefore, the imagined prejudice to which the defendants point did not materialize.

IV

The defendants raise four issues pertaining to damages. They assert that the trial court improperly: (1) allowed the jury to consider damages for the plaintiff's lost educational opportunities; (2) allowed the jury to award multiple punitive damages; (3) awarded punitive damages in connection with the common-law claims, and (4) failed to grant a remittitur. We reject these claims.

A

In its instructions on the issue of compensatory damages, the trial court told the jury that, in assessing noneconomic damages, it could consider the plaintiff's claim that his wrongful incarceration had interfered with his plans to attend school. The defendants claim that, because the

plaintiff never attempted to reenroll at the University of Connecticut, and in fact went to Gateway Community College, and because he was unable to attend school for at least three months in 1993, when he was incarcerated on another matter, the aforementioned instructions were improper. The defendants failed, however, to preserve this claim. Indeed, on the contrary, they expressly informed the court at the conclusion of its charge that they had no objections. Therefore, this claim is unpreserved. As we have stated repeatedly, issues not properly raised before the trial court will ordinarily not be considered on appeal. Practice Book § 60-5. In the absence of any assertion as to why this issue may warrant review under the plain error doctrine, we decline to consider it. *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 48, 717 A. 2d 77 (1998).

B

The defendants next claim that the trial court improperly allowed the jury to award multiple punitive damages. Specifically, they claim that the trial court should not have

allowed the jury to award punitive damages for both constitutional violations. Rather, they contend that the award should have been limited to $200,000 against each defendant "for the combined violations of federal false arrest and federal malicious prosecution . . . . This would have resulted in an award of $400,000, rather than $800,000.

The plaintiff argues in response that: (1) this claim was not properly preserved below; and (2) separate awards of punitive damages with respect to each aspect of a defendant's conduct were proper because "the constitutional torts of false arrest and malicious prosecution compensate a plaintiff for different harm *See Singer v. Fulton County Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995) ("[t]ypically, a warrantless deprivation of liberty" from the moment of arrest to the time of arraignment will find its analog in the tort of false arrest . . . while the tort of malicious prosecution will implicate post-arraignnient deprivations of liberty" [citation omitted]); *Hygh* v. *Jacobs,* 961 F.2d 359, 366 (2d Cir. 1992) (damages may be awarded for false arrest for period from initial custody until arraignment, and subsequent damages from

continued incarceration are attributable to malicious prosecution). We agree with the plaintiff's first response and, therefore, do not address the merits of the claim.

In its instructions regarding compensatory damages, the trial court told the jury that, if it reached a verdict in favor of the plaintiff, it was to put a figure on each of the verdict forms that represented the total amount of compensatory damages it deemed appropriate. Punitive damages were, however, to be treated differently. The jury was told expressly that whatever figures it put on each of the verdict forms used for the constitutional claims would be added together by the court afterwards.

The defendants did not object to the instructions to the jury allowing it to consider separate punitive damage awards for each of the two constitutional claims.[13] Nor do

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[13] Additionally, we note that on February 28, 1996, the defendants moved for a directed verdict after the plaintiff's case, after their own case, and again on March 1, 1996, after the plaintiffs rebuttal, but failed each time to raise the issue of punitive damages. On February 16, 1996, the defendants filed their request to charge, which also neglected to address the issue raised herein.

"We recognize that a trial court has the inherent authority to set aside a verdict even where no motion to set aside the verdict has been

they argue that this court should review the claim as a matter of plain error. See Practice Book § 60-5. "Only in the most exceptional circumstances will this court consider a claim that was not raised in the trial court." *Cahill v. Board of Education,* 187 Conn. 94, 99, 444 A.2d 907 (1982). The

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filed. See, e.g., *A-G Foods, Inc. v. Pepperidge Farm, Inc.*, 216 Conn. 200, 206, 579 A.2d 69 (1990); *State v. Avcollie*, 178 Conn. 450, 455, 423 A.2d 118 (1979), cert, denied, 444 U.S. 1015, 100 S.Ct. 667, 62 L. Ed. 2d 645 (1980); *Belchak v. New York, N.H. & H.R. Co.*, 119 Conn. 630, 637, 179 A.95 (1935). This does not mean, however, that [the defendants] need not have raised issues arising during the trial, in a motion for a directed verdict, in order for the appellate tribunal to review the trial court's denial of a motion to set aside the verdict. See W. Gallagher, Post-trial Motions (1980) p.22 ('an absolute prerequisite to the motion under Section 321 is the filing of the motion for directed verdict'). In *Avcollie*, the defendant had filed a motion for directed verdict, thus properly alerting the court to the issue. *State v. Avcollie*, supra, 455. In *Belchak*, the verdict was set aside because it was inconsistent, as a matter of law, with the jury's answers to interrogatories, an issue that could not have been raised during the trial. *Belchak v. New York, N.H. &H.R. Co.*, supra, 632-33. In *A-G Foods, Inc. v. Pepperidge Farm, Inc.*, supra, 206 we noted the trial court's inherent authority to set a verdict aside but did not reach the issue of whether such action was proper when no motion for directed verdict had been filed." *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, supra, 245 Conn. 49-50 n.44.

In this case, the defendants' failure to raise this issue before the case was submitted to the jury precluded the trial court from addressing this question in a timely fashion. Specifically, had the issue been raised and had the trial court agreed with the defendants, there would have been an opportunity to allow the jury to mechanically treat punitive damages similarly to compensatory damages but nevertheless to award $800,000.

issue first arose in the defendants' posttrial motions. The trial court cited relevant factual distinctions between the two federal constitutional violations, which the jury reasonably could have relied upon in its award.[14] On the basis of our review of the record and the federal case law addressing this issue, we conclude that the trial court's ruling did not constitute plain error.

C

In their third claim, the defendants argue that the trial court improperly awarded punitive damages for the common-law claims. Specifically, they claim that the punitive

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[14] Specifically, in this regard, the trial court drew the following distinctions: "[T]he court believes what is relevant is the distinction between the two federal constitutional violations. For malicious prosecution the jury need only find that the police knew or should have known there was no probable cause for a person's arrest. As to this element a jury could find it established even if a policeman had a sincerely held suspicion a person was guilty of a crime but procured his arrest knowing there was no probable cause for it. On a false arrest claim under the facts of this case the jury was instructed and could be taken to have found from their verdict that the officers submitted a warrant to a judge knowing the affidavit contained material omissions or misleading assertions. That is an entirely different and added finding which this court cannot conclude the jury had no right to attach some significance to and thus could not take into account in awarding punitive damages on each federal constitutional claim."

damages award in connection with the common-law claims was unfair because the punitive damages award of $800,000 more than fairly compensated the plaintiff. Additionally, they assert that the award of attorney's fees to which the plaintiff is entitled is limited to the amount awarded on the federal claims under 42 U.S.C. § 1988 (b).[15] The record contains the following additional relevant facts.

As the verdict forms reflect, and in accordance with the trial court's instructions, the jury determined that punitive damages should be awarded in connection with the state law violations. The amount of those damages was, however, to be left to the trial court to determine. The court acknowledged that the plaintiff was a party to a retainer agreement with counsel providing that the fee would be 40 percent of any recovery, but cautioned that, "[i]n light of the court's instructions on how state and federal punitive damages were to be calculated by the jury, the court tends to agree that if the retainer agreement were to be used to

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[15] See footnote 6 of this opinion.

determine the amount of state punitive damages there would be a double recovery or at least the danger of such a recovery being imposed without any fair way to determine if in fact that were the case." Additionally, the court recognized that the $100,000 compensatory damage award was made on both the state and federal claims, and that there was no way to apportion the award as between them. Thereafter, the court reasonably decided to avoid these problems by relying on the costs of litigation as the means by which to determine the amount of state punitive damages. See Berry v. *Loiseau,* 223 Conn. 786, 831, 614 A.2d 414 (1992).

The court then set a rate of $150 per hour as fair compensation. There had been a claim by plaintiffs counsel that 248.80 hours had been dedicated to the present case. The question of how many hours reasonably had been devoted to the state claims was recognized, but no satisfactory answer could be readily ascertained. The court then concluded that 200 hours was a reasonable time for the prosecution of the state claims and determined the punitive damage award to be $30,000.

On appeal, the defendants essentially make two claims. First, they claim that the trial court improperly awarded counsel fees in connection with the state claims because the identical conduct gave rise to the federal claims for which the plaintiff will be entitled to counsel fees pursuant to federal statute. The plaintiff, however, has not made any request thus far for counsel fees in connection with the federal claims. The court specifically noticed that such claim had not been made, that the subject award would not preclude the court from awarding additional attorney's fees on the federal claims, and that the court "at the end of these proceedings should be careful not to make a double award for the costs of litigation." Additionally, we note that the decision whether to award fees under § 1988 is discretionary. "In any action or proceeding to enforce a provision of sections . . . [§§ 1981 through 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (b). Consequently, the issue of

whether the award is duplicative is not properly before the court, and indeed, may never be an issue before this tribunal.

The defendants' second claim is that the award of $800,000 in federal punitive damages more than fairly compensated the plaintiff. Our treatment of this issue is subsumed in our discussion in part IV D of this opinion.

D

Finally, the defendants claim that the trial court should have granted a remittitur because the jury award was excessive. The law in this area is well settled, and we do not attempt today to improve upon our recent decisions in this regard.

"Litigants have a constitutional right to have factual issues resolved by the jury. . . . This right embraces the determination of damages when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded. . . . This right is one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact

as to which there is room for a reasonable difference of opinion among fair-minded men passed upon by the jury and not by the court. . . . The amount of a damage award is a matter peculiarly within the province of the trier of fact, in this case, the jury. . . . The size of the verdict alone does not determine whether it is excessive. The only practical test to apply to [a] verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption. . . . In considering a motion to set aside the verdict, the court must determine whether the evidence, viewed in the light most favorable to the prevailing party, reasonably supports the jury's verdict. . . . The trial court's refusal to set aside the verdict is entitled to great weight and every reasonable presumption should be indulged in favor of its correctness. . . . This is so because [f]rom the vantage point of the trial bench, a presiding judge can sense the atmosphere of a trial and can apprehend far better than we can, on the printed

record, what factors, if any, could have improperly influenced the jury. . . . It is the function of this court to determine whether the trial court abused its discretion in denying [a defendant's] motion to set aside the verdict." (Citations omitted; internal quotation marks omitted.) *Mather v. Griffin Hospital*, supra, 207 Conn. 138-39.

In the present case, the trial court recognized that the award was sizeable, but concluded that it was not one that "shocks the conscience." Concluding that there were "absolutely no guidelines to be used in [disturbing the award] except the judge's personal predilections as to what would be fair or appropriate," the court declined to remit any portion of the awards. We do not find that the trial court abused its discretion.

The judgment is affirmed.

In this opinion BORDEN, BERDON and PALMER, Js., concurred.

MCDONALD, J., dissenting. I disagree with the majority's determination that the jury reasonably could have found that the defendants lacked probable cause to arrest the

plaintiff. "[Wlhether particular facts . . . constitute probable cause is always a question of law"; *Vandersluis v. Weil*176 Conn. 353, 356, 407 A.2d 982 (1978); and therefore our review is plenary. Under this standard, I would hold that there was insufficient evidence for the jury to find that the defendants lacked probable cause to arrest the plaintiff. Accordingly, I would remand the case with direction to render judgment for the defendants on all counts of the plaintiff's complaint.

The lack of probable cause is a critical element of both the plaintiff's malicious prosecution claim and false arrest claim under common law; see, e.g., id. (tort of malicious prosecution); *Beinhorn v. Saraceno, 23* Conn. App. 487, 491, 582 A.2d 208 (1990), cert. denied, 217 Conn. 809, 585 A.2d 1233 (1991) (tort of false arrest); and under 42 U.S.C. § 1983; see *Ricciuti v. New York City Transit Authotity,* 124 F.3d 123, 128, 130 (2d Cir. 1997) (federal civil rights claims for malicious prosecution and false arrest); *Singer v. Fulton County Sheriff,* 63 F.3d 110, 117-18 (2d Cir. 1995) (same). In making a finding of probable cause, the

trial court must determine "whether the . . . evidence [offered] would warrant a person of reasonable caution to believe that the accused [had] committed the [charged offense]." (Internal quotation marks omitted.) In *re* Keijam T., 221 Conn. 109, 115, 602 A.2d 967 (1992). "Evidence is not required to rise to a significant level of trustworthiness in order to meet the probable cause standard." *State v. Lewis,* 245 Conn. 779, 808, 717 A.2d 1140 (1998). "The quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction. Our cases have made clear [t]hat there is often a fine line between mere suspicion and probable cause, and [t]hat line necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances." (Internal quotation marks omitted.) *State v. Marra,* 222 Conn. 506, 513, 610 A.2d 11 13 (1992).

The issue in this case is whether the affidavit submitted by the defendants in support of their application for an arrest warrant, if corrected by adding the information

omitted, and looking at the evidence in a light most favorable to the plaintiff's case, supports a reasonable belief that probable cause did not exist. See *Cartier v. Lussiter*, 955 F.2d 841, 845 (2d Cir. 1992) ("[a]fter the affidavit has been corrected in a light most favorable to the plaintiffs . . . if there remains an objective basis supporting probable cause, no constitutional violation of [the plaintiffs] Fourth Amendment rights has occurred").[16] Therefore, the plaintiffs case can succeed only "where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . ." *Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

Applying this standard, I would conclude that, under an interpretation of the evidence most favorable to the

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[16] *Cartier* concerned whether the trial court in that case should have granted the defendant's motion for summary judgment, which was based on the defendant's assertion of qualified immunity. *Cartier v. Lussiter*, supra, 955 F.2d 842. The same principles apply, however, to the question before this court today, namely, whether the trial court should have granted the defendants' motion for a directed verdict or judgment notwithstanding the verdict.

plaintiff, the affidavit established probable cause. It is undisputed that the affidavit provided that two eyewitnesses, Lynwood Cypress and Joseph Timothy Davis, identified the plaintiff as the assailant who murdered one victim and wounded the other. Cypress, who was not identified by name in the affidavit, stated that, approximately thirty minutes before the shooting, the plaintiff, his friend "Joe" and another black male were driving around the area in an older model, beige, Datsun station wagon with wood like side panels and a luggage rack on top. According to the affidavit, Cypress stated that the vehicle had stopped near Sylvan Avenue and Ward Street in New Haven. Five to six black males were walking down the street, with their backs to the plaintiff, when the plaintiff, who had exited the vehicle, started shooting at them. Cypress stated that the vehicle then left the area, but that the plaintiff and Joe returned to the area of the shooting on foot approximately ten minutes later. According to Cypress, the plaintiff was wearing a black ski cap, a black army type jacket and black pants. The affidavit also provided that, after obtaining a

search warrant for the plaintiff's residence, the police found and seized one black army type jacket, one brown empty pistol holder and one empty Remington .22 caliber bullet box.

While police were at the plaintiff's residence, Davis, approached the defendants and agreed to give a statement about the incident. According to the affidavit, Davis stated that he had known the plaintiff for over eleven years and that they were very good friends. On the day of the shooting, Davis was the driver of the beige station wagon, the plaintiff was a passenger in the front seat, and a man named James sat in the backseat. Davis stated that he stopped the vehicle in the area of Sylvan Avenue and Ward Street and that the three men got out of the vehicle. According to Davis, the plaintiff was playing with a nine millimeter handgun when it accidentally discharged numerous times, hitting the victims. Davis stated that the plaintiff immediately got back into the vehicle and told Davis to drive away quickly. The police previously had located and seized the described vehicle on Hamilton Street in New Haven. Davis further stated that he

and the plaintiff went back to the scene of the shooting on foot to see if anyone was hurt.

The facts alleged in the affidavit were sufficient to establish probable cause for the plaintiffs arrest. The identification of the plaintiff as the shooter by both Cypress and Davis, and the consistencies in their accounts, clearly established probable cause. Additionally, Davis' statement that he drove the getaway car was against his interest and, therefore, reliable. See, *e.g., State v. Barton,* 219 Conn. 529, 551, 594 A.2d 917 (1991). The information omitted from the affidavit, given an interpretation most favorable to the plaintiff, only establishes that: (1) Cypress made two statements to the police before incriminating the plaintiff in his third statement; and (2) Davis initially had stated that the plaintiff fired the pistol from inside the vehicle but later had stated that the plaintiff was outside the vehicle when he fired the gun. Neither of these revelations nor the varied identifications of the gunman by other witnesses sufficiently impugns the probable cause established by the defendants. "Once a police officer has a reasonable basis for believing

there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Ricciuti v. New York City Transit* Authority, supra, 124 F.3d 128.

If the criminal case against the plaintiff had gone to trial and he had been convicted for the shootings, an appellate court would hold that there was sufficient evidence for the jury reasonably to conclude that the plaintiff had committed the offenses charged. If both Cypress and Davis had testified in accordance with their statements, and had been cross-examined as to the omitted discrepancies, and if the plaintiff had produced witnesses with contrary testimony, the jury reasonably could have believed that the plaintiff was the shooter despite any contrary evidence. Even if Cypress and Davis refused to testify in accordance with their statements and recanted their identification of the plaintiff as the shooter, their written and signed or recorded statements of identification would be admissible as substantive evidence at trial. See, e.g., *State v.* Woodson, 227 Conn. 1, 20-21, 629 A.2d 386 (1993); *State v. Whelan,* 200 Conn. 743, 753, 513

A.2d 86, cert,. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). This would be sufficient evidence for a jury to convict the plaintiff for the shootings. See *State v. Newsome,* 238 Conn. 588, 612-19, 682 A.2d 972 (1996).

While I conclude that probable cause existed for the plaintiff's arrest, I also would hold that the defendants are protected from the plaintiffs civil rights claims by the doctrine of qualified immunity. "An arresting officer is entitled to qualified immunity from a suit for damages on a claim for arrest without probable cause if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." (Internal quotation marks omitted.) Lee *v. Sandberg,* 136 F.3d 94, 102 (2d Cir. 1997). Thus, "[t]he issue for immunity purposes is not probable cause in fact but 'arguable' probable cause." (Internal quotation marks omitted.) Id., quoting Myers *v. Morris,* 810 F.2d 1437, 1455 (8th Cir.), cert. denied, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987),

The trial court observed that the existence of probable cause in this case was a "close call." The doctrine of qualified immunity is intended to protect officers in these precise situations, in which the officers must make discretionary decisions that are close calls. "[Ojfficers must frequently make credibility determinations in deciding whom to arrest, and imposing liability in circumstances like the ones present here would hamstring law enforcement efforts to a degree not only unfair to the individual officer but grossly destructive of the public welfare." *Stigall v.* Madden, 26 F.3d 867, 869 (8th Cir. 1994). 1 would conclude in this case that the defendants have qualified immunity.

The result in this case only further endangers our cities, already beset by the kind of random, violent crime that terrifies witnesses and renders effective law enforcement very difficult. The breakdown of social control of violent crime creates an atmosphere in which the law abiding citizen cannot remain. The very survival of our cities is, in this sense, endangered by upholding this nearly one million dollar verdict against detectives faced with an onslaught of

violence and reluctant witnesses. The majority's opinion, holding police detectives liable for performing their duties in a reasonable manner, leads to substantial detrimental effects on society, "ranging from an inability to attract qualified candidates to serve in public positions, to a diversion from the discharge of official duties and towards the avoidance of litigation, to inhibiting the zealous performance of official obligations." Cartier *v. Lussiter,* supra, 955 F.2d 844. Accordingly, I dissent from such a chilling and repressive result, which violates the constitutional duty of a state to ensure domestic tranquility.

STATE OF CONNECTICUT
SUPREME COURT

NO. SC 15806

ERIC HAM

V.

JOSEPH GREENE ET AL. : JUNE 9, 1999

ORDER

THE MOTION OF THE DEFENDANTS, FILED MAY 14, 1999, FOR REARGUMENT OR REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY O R D E R E D **DENIED.** NORCOTT, J., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT,

/S/_____
CHIEF CLERK

NOTICE SENT: JUNE 9, 1999
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STATE OF CONNECTICUT
SUPREME COURT

NO. SC 15806

ERIC HAM

V.

JOSEPH GREENE ET AL. : JUNE 9, 1999

ORDER

THE MOTION OF THE DEFENDANTS, FILED MAY 14, 1999, FOR STAY OF PROCEEDINGS AND STAY OF EXECUTION OF JUDGMENT, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY ORDERED GRANTED UNTIL THE EXPIRATION OF THE TIME OF PETITION TO THE UNITED STATES SUPREME COURT OR, IF A PETITION IS FILED, UNTIL THAT COURT HAS TAKEN ACTION IN THIS CASE, EITHER BY A DENIAL OF THE PETITION FOR CERTIORARI OR, IF APPLICABLE, BY A DECISION ON THE MERITS. NORCOTT, J., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT,

/S/
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Supreme Court, U.S.
FILED
SEP 1 1999
OFFICE OF THE CLERK

No. 99-214

In The

Supreme Court of the United States

JOSEPH GREENE, et al.,

Petitioners,

v.

ERIC HAM,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF IN OPPOSITION

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ISSUES PRESENTED

A. The cases cited by the petitioners do not evidence a division of opinion in the state and federal courts.

B. The petitioners incorrectly argue that the standard for a court's consideration of "material facts in dispute" on a motion for summary judgment based upon qualified immunity is the same as the determination of "materiality" in a *Franks* context.

C. Contrary to the assertions of the petitioners, the courts agree that questions of fact related to liability and qualified immunity in *Franks* cases are properly decided by the jury.

D. The law was well settled at the time the petitioners sought the arrest warrant for the respondent.

E. Distinguishing "exculpatory" evidence from "impeachment" evidence is inapposite to the issues presented by the petition, and as the claimed issue was not decided by the Connecticut Supreme Court, review is not warranted here.

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STATEMENT OF THE CASE

This petition seeks this Court's review of limited portions of the Opinion of the Supreme Court for the State of Connecticut entitled *Eric Ham v. Joseph Greene, et al.*, 248 Conn. 508 (1999), officially released on May 4, 1999.[1]

The petitioners ostensibly challenge the decision of the Connecticut court on two bases: first,

> whether in a civil rights lawsuit claiming false arrest and malicious prosecution pursuant to an alleged inadequate arrest warrant application evidence that merely tends to impeach the credibility of witnesses is "material" and required to be disclosed in the *non*adversarial warrant application phase;

and second,

> whether in a civil rights lawsuit claiming false arrest and malicious prosecution pursuant to an alleged inadequate arrest warrant application the "materiality" of information omitted from the warrant application is a legal question for the Trial Court or a factual question for the jury.

Pet. 7-8. As such, the petitioners explicitly do not seek review of the Connecticut Supreme Court's opinion insofar as it upheld the verdict in favor of the respondent on

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[1] The petitioners erroneously state that the decision was "officially published May 9, 1999." Pet. 2. Petitioners alternately state that "[t]he decision of the Connecticut Supreme Court's [sic] was officially published May 4, 1999." Pet. 5. The correct official release date of the Opinion is May 4, 1999. *Ham*, 248 Conn. at 508.

the Connecticut state tort law claims of malicious prosecution and intentional infliction of emotional distress, and the punitive damages awarded on the basis of those torts.

In support of their contentions, the petitioners allege that there exists "a division of opinion within and among the federal and State courts" on the issues presented by their petition. Pet. 7. The cases to which the petitioners cite, however, are inapposite to their argument, and as discussed more fully below, do not evidence a division of opinion on the issues stated by the petitioners. Similarly, the petitioners make numerous misrepresentations of fact and misleading statements of law, the latter at times absent any citation whatsoever in support of their legal assertions. Each of the aforementioned will be discussed in detail below, and will demonstrate that review by this Court of the instant case is not warranted.

Absent any actual division of opinion as applied to the particular circumstances of the subject case, the request of the petitioners to this Court is reduced to one of review of factual determinations made by the jury, reviewed and upheld by the trial court, and ultimately, reviewed and affirmed by the Connecticut Supreme Court.[2] Integral to an understanding of the conclusions reached is a review of the facts of the case.[3]

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[2] The detailed analysis conducted by the Connecticut court is found in *Ham*, 248 Conn. 519-526. Of the entirety of the court's reasoning, the petitioners only specifically take issue with the contextually devoid half-sentence "could not possibly have affected the magistrate's decision to issue the warrant." Pet. 18.

[3] The facts as articulated appear nearly verbatim in the Connecticut court's decision, and emanate directly from the

On January 20, 1991, a light colored station wagon containing two or three African-American males stopped in the vicinity of Sylvan Avenue and Ward and Asylum Streets in New Haven. A black male, approximately five feet five inches to five feet eight inches tall, with a dark complexion and a stocky build, stepped out of the automobile and fired approximately ten shots from a weapon into a crowd of people. He then got back into the vehicle and left the scene. There were two victims of the shooting: Markiest Alexander, age fourteen, who died as a result of the gunshot wounds; and Alfred Brown, age eighteen, who was seriously injured.

New Haven police responded to the scene. The petitioner Greene was the detective assigned to investigate the shooting and was responsible for coordinating the investigation, locating and interviewing witnesses, retrieving and examining physical evidence, preparing police reports and reviewing reports of other police department members involved in the investigation. The petitioner Sweeney was the supervisor of the investigation. Numerous witnesses identified through the petitioners' investigation were taken to police headquarters that evening and interviewed by the petitioners. They recovered, among other items, ten nine millimeter shells from the scene. Among those witnesses who gave separate tape-recorded statements to the petitioners within hours of the shooting, were Ronald Hannans, Tashim Thomas, Terry Williams and Troy Carson.

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evidence adduced at trial, as recorded in the transcript of the trial. *Ham*, 248 Conn. 510-518.

Thomas, who had stood approximately thirty feet away from the shooter, described the shooter to the petitioners as a dark skinned black male, approximately five feet eight inches tall, with a stocky build. Hannans told the petitioners that he did not recognize the shooter, whom Hannans described as a black male approximately five feet seven inches tall. Carson told the police that, moments before the shooting, he had seen a car with three black males cruising the area. He described the shooter as a dark skinned black male, approximately five feet seven inches to five feet eight inches tall with a stocky build. The male was dressed all in black. He could not identify the shooter beyond that physical description. Carson knew the respondent and told the police that he had seen him near the crime scene with a male named Timothy Davis. He stated that he saw the respondent and Davis only after the shooting had occurred and the police had arrived, as the two were leaving the area and as the crowd of onlookers was dissipating. Although Carson knew the respondent, he neither identified him as the shooter, nor suggested that the respondent was involved. Williams, who gave the same physical description of the shooter as the previous three witnesses, identified the weapon used as a "shiny nine millimeter."

On February 6, 1991, Tremaine Ortiz, another witness to the shooting, also described the shooter as a dark skinned black male, approximately five feet five inches tall with a medium build. Ortiz verified that the shooter had a uniquely shiny handgun and that a person named "Joe," who fit the description, was known for robbing drug dealers in the area where the shooting occurred.

Shortly after the evening of the shooting, the petitioners interviewed Brown, the surviving victim. He told the police that his assailant was a black male, approximately five feet nine inches tall. Brown, who knew the respondent from school and the neighborhood, told the petitioners that he did not recognize his assailant and, in fact, had never seen him before.

Nearly three weeks after the shooting, on February 6, 1991, the petitioners interviewed Lynwood Cypress. Cypress described the shooter as a dark skinned black male, five feet five to five feet seven inches tall, with a stocky build. He confirmed Williams' description of the weapon. Additionally, he advised the petitioners that the shooter was the same person who had tried to rob him at gunpoint earlier that evening, shoving the same firearm into his stomach. Cypress was then transported to the police department where he gave a tape recorded statement in which he repeated his earlier description of the shooter. Cypress believed that the shooter's name was Joe, but did not know the man's full identity. Finally, Cypress told the petitioners that he had seen the same person two days after the shooting, but had not seen him in a while and therefore assumed that he was not from New Haven.

In contradiction to his earlier statements, on February 11, 1991, in his third statement to the petitioners, Cypress stated that he personally knew the respondent and that the respondent was the shooter. He witnessed the respondent get out of a station wagon and open fire into a crowd of people on Sylvan Avenue. According to Cypress, the respondent was dressed in black pants, a black jacket, black shoes and a black hat and was carrying

a nickel plated nine millimeter gun that he used to shoot the victims. The respondent thereafter got back into the car, which sped away. The vehicle was driven by someone named Joe, whom Cypress also recognized. He did not know the person in the back seat. The respondent and Joe returned moments later and stood in the crowd of onlookers for three to four minutes. According to this statement by Cypress, he and Carson stood close to the respondent and Joe, and Carson conversed with them.[4]

Joseph Timothy Davis also gave a statement to the police in which he incriminated the respondent. He described how, on the day of the shooting, he and the respondent had been driving around in a station wagon that he had rented from someone in the neighborhood. According to Davis, they had stopped at the corner of Sylvan and Asylum Streets to talk with some friends, when the respondent began playing with a nine millimeter gun he was carrying. The respondent leaned over Davis, and while he was tapping the weapon on the windowsill of the car, the gun discharged, and bullets ricocheted off the ground, striking two boys whom Davis knew from the neighborhood. Thereafter, they left the scene. In contradiction to every other witness as to the location of the shooter, in that statement, Davis reiterated that the respondent was seated in the car when the gun was fired. Following police questioning, Davis changed

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[4] Despite extensive cross examination of the petitioners at trial on this issue, the jury's verdict, the trial court's written findings and the Connecticut Supreme Court's discussion of the matter, the petitioners assert that "the fact that [Lynwood Cypress] gave the incriminating statement was not challenged." Pet. 5.

his story regarding the respondent's location, this time placing the respondent outside the vehicle during the shooting.

At trial, Davis described how he had been taken to the New Haven police station where Greene intimidated and threatened him with prosecution. Davis related how Greene had told him falsely that the respondent had incriminated him in the shooting. Davis further testified that Greene, in effect, had told him what to say in his tape-recorded statement. Davis testified that in order to ensure his release, Davis had fabricated a story incriminating the respondent, which was included in the warrant affidavit. Davis further explained to the jury that on February 18, 1991, he recanted his statement incriminating the respondent. There was also evidence that the petitioners were aware of the recantation.

On January 28, 1991, the petitioners learned from two inmates, one of whom was a relative of one of the victims, that an individual identified as Joe Covington, who was incarcerated at the New Haven Community Correctional Facility, was claiming responsibility for the shooting of Brown and Alexander. He had boasted to at least five people that he was responsible for the January 20, 1991 shooting. He provided details of the crime and how it had occurred. The petitioners sent another policeman to interview two other inmates, George Galberth and Michael Gaetano, but they never interviewed Covington in connection with their investigation. Nor did they assign any other member of the police department to interview him or to show Covington's photograph to any of the witnesses.

On February 11, 1991, the petitioners were given information that an individual named Tyrese White had shot Alexander and Brown. On the same date, the petitioners received information from another source that an individual nicknamed "Ears" had had a dispute with Alexander two weeks before the shooting, and had threatened him at that time with a firearm. Neither lead was investigated. The petitioners did, however, reinterview Carson that day. He repeated much of what he had already stated to the police on the evening of the shooting. He reiterated that he could not identify the shooter beyond the physical description he had already provided, and that he had seen the respondent and Davis leaving the area of the shooting as the crowd of onlookers dissipated, only after the shooting had occurred and the police had arrived.

On February 12, 1991, Greene executed a search warrant at the respondent's household. The respondent, an eighteen year old black youth, six feet two inches tall, light skinned, and of slim build, weighing 155 pounds, was present at the time of the search. He had extensive contact with Greene, thereby allowing Greene carefully to observe the respondent and take note of his physical appearance.

On February 13, 1991, the petitioners prepared and submitted an affidavit in support of a request for an arrest warrant for the respondent, charging him with murder in the first degree, assault in the first degree and two counts of criminal use of a firearm. Although it did not identify Cypress as the author, the affidavit prepared by the petitioners included information obviously taken from Cypress' third statement, the one in which he

incriminated the respondent. Their affidavit also included the contents of the statement by Davis that he had been with the respondent when the respondent shot the victims. The warrant did not, however, include that portion of Davis' earlier statement placing the respondent inside the vehicle when the weapon discharged.

Additionally, the warrant did not include the fact that Thomas, Carson, Hannans, Williams and Ortiz, neutral eyewitnesses to the shooting, had told police that the shooter was five feet seven inches or five feet eight inches in height, with a dark complexion and a stocky build. Nor did the affidavit refer to Brown's statement. Although the warrant referred extensively to Cypress' incriminating statement, it failed to even mention the fact that he had given two previous statements, neither of which included an identification of the respondent as the shooter. Nor, therefore, did it include a reference to the fact that Cypress had first described the shooter as being a dark skinned black male, five feet five or six inches in height with a stocky build, or the fact that the shooter, known to him only as Joe, had tried to rob Cypress earlier on the day of the shooting. Further omitted from the affidavit was Cypress' statement that, although he had seen Joe two days after the shooting, he had not seen him for a long time and therefore assumed he was not from the area. Finally, the warrant also failed to mention Covington. Indeed, it did not include any reference to the two prison inmates who had reported to the police that Covington had boasted about being the shooter while providing details about the incident and its victims.

Based upon the affidavit prepared by the petitioners, a warrant for the respondent's arrest was issued on

February 13, 1991. The warrant was executed by the petitioners that day, and the respondent was arrested and held in custody until May, 1991. On May 9, 1991, the criminal prosecution was nolle prosequied by the state because the two witnesses, Cypress and Davis, recanted their earlier statements implicating the respondent. The charges thereafter were dismissed by operation of law.

In August, 1991, the respondent brought a complaint against the petitioners, charging them each with federal civil rights claims pursuant to *42 U.S.C. §§ 1983* and *1988* for false arrest and malicious prosecution and with common-law claims of malicious prosecution and the intentional infliction of emotional distress.

The case was tried to the jury, which returned a verdict in favor of the respondent as to both petitioners. The verdict forms reflect the following awards against each of the two petitioners: $100,000 compensatory damages for each of the two federal civil rights claims and $100,000 compensatory damages for each of the two common-law claims. Additionally, as indicated on the verdict forms, the jury awarded the respondent $200,000 in punitive damages against each of the two petitioners for each of the two civil rights claims. The jury had been instructed by the trial court that there would be one award for compensatory damages and that its verdict form should reflect the total amount it considered appropriate. In the absence of any evidence indicating that separate types of compensatory damages should have been awarded based upon the different theories of liability, the trial court approved the total award of $100,000 for compensatory damages. Turning to the issue of punitive damages, the trial court approved the total award of

$800,000 in punitive damages in connection with those claims.[5]

The petitioners thereafter filed a single motion requesting that the trial court arrest judgment, set aside the verdict, enter judgment notwithstanding the verdict or alternately, grant a new trial. The respondent subsequently filed his motion in objection thereto. The trial court heard oral argument on the petitioners' post trial motions no fewer than four times.

On May 7, 1997, the trial court issued a written memorandum of decision on the petitioners' motion. In its twenty-seven page decision, the trial court upheld the jury's verdict and awards. Pet. 1A-31A.

The petitioners thereafter appealed to the Connecticut Supreme Court. On May 4, 1999 the court issued its Opinion affirming the jury's verdict and the trial court's refusal to set aside that verdict. *Ham v. Greene*, 248 Conn. 508 (1999).

This petition followed.

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[5] Contrary to the assertions of the petitioners, damages in the instant case were never "reduced on posttrial motion" or remitted in any way. Pet. 4. To the contrary, the trial court increased the amount of the award subsequent to the jury's determination of punitive damages on the state law claims. *Ham*, 248 Conn. at 518-519. This award was affirmed by the Connecticut court, and is not here challenged. *Id.*, 534-537.

REASONS FOR DENYING THE WRIT

A. The cases cited by the petitioners do not evidence a division of opinion in the state and federal courts.

The Petitioners claim that four federal cases exist which, they purport, "support their petition," and assumedly, are at odds with the state and federal cases cited by the court in *Ham v. Greene*. Pet. 7 n.1.

A careful examination of *all* of the cases cited by the petitioners, however, reveals an absence of the claimed conflict. Each of the cases are inapposite to the issues presented by the instant petition. Three of the four cases offered by the petitioner – *Smith, Hervey* and *Branch* – consider the issue of qualified immunity in a *Franks* case **on pretrial motion**.[6] The fourth, *Stigall*, addresses the entry of judgment in favor of the defendants after trial – the plaintiff having survived a motion for summary judgment – pursuant to their motion for judgment as a matter of law.[7] None of the cases cited by the petitioners stand

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[6] *Smith v. Reddy*, 101 F.3d 351 (4th Cir. 1996) (qualified immunity at the summary judgment stage); *Hervey, et al. v. Estes, et al.*, 65 F.3d 784 (9th Cir. 1995) (qualified immunity at the summary judgment stage); *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (qualified immunity upon motion to dismiss).

[7] *Stigall v. Madden, et al.*, 26 F.3d 867 (8th Cir. 1994). It is fascinating that the petitioners include this case among those that they assert support their petition. The term "qualified immunity" is nowhere used in the court's opinion. In reaching its conclusion, the court applies the directed verdict standard, and in dicta, obliquely refers to the objective reasonableness of the officer:

> We do not believe that this is evidence from which a factfinder could have found for the plaintiff. The

for the proposition that issues of fact should be taken from the jury in the wholesale fashion that the petitioners claim. *Smith, Hervey, Branch, Stigall, supra.*

On the basis of three of the cited cases,[8] the petitioners assert that a division exists in the law whether the issue of materiality[9] in the context of civil rights cases

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> question in a case like this is 'whether a reasonably well-trained officer in [this officer's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.'
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> *Id.* at 869.

The court evidently considered facts found by the jury and ruled upon them as a matter of law, but what those facts were is a matter of sheer speculation. The court merely conclusorily states that "[t]he information on which Mr. Burrow acted was not inherently unreliable, nor was it obviously less credible than the evidence opposed to it. There was, therefore, nothing objectively unreasonable about believing it." *Id.* The probative value of this case to the petitioners is nil – it stands for none of the propositions for which it may conceivably be offered. If, however, it may be construed to stand for the permissibility of a trial court allowing disputed issues of fact to survive a motion for summary judgment and be submitted to the jury, and thereafter to review the findings of the jury against the template of objective reasonableness (e.g., qualified immunity), then it in fact supports the procedure undertaken by the trial and reviewing courts in *Ham, supra.*

[8] *Smith v. Reddy*, 101 F.3d 351 (4th Cir. 1996); *Hervey, et al. v. Estes, et al.*, 65 F.3d 784 (9th Cir. 1995); *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991).

[9] The petitioners expand their argument as the petition progresses to encompass numerous factual questions, including: what material was omitted from or included in the warrant affidavit; its truth or falsity; the weight a reviewing magistrate would give such information; the "compelling"

pursuant to *Franks v. Delaware*[10] is a question of law for pretrial determination by the court, or a question of fact properly left to the jury at trial. The petitioners further argue that the Connecticut Supreme Court erred in upholding the latter procedure in *Ham v. Green, supra.* Pet. 8. The petitioners, however, have chosen to ignore the obvious – in each of the cases cited by them the defendants therein submitted to the trial court **dispositive pretrial motions based upon qualified immunity**. *See generally, Smith,* 101 F.3d 351; *Hervey,* 65 F.3d 784; *Branch,* 937 F.2d 1382. None of the cases cited hold that the questions of fact identified by the petitioner are considered by the court for any but the limited purpose of the determination of the pretrial motion. In the instant case, however, the petitioners did not file any pretrial motions whatsoever. Further, the petitioners raised no objection at trial to the correct presentation of the factual issues to the jury, and in fact, the petitioners agreed to the charge of

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nature of such information; whether omitted information "negate[d] guilt;" whether such information would have led to the decision "to not prosecute;" whether the actions of the officer constituted "error"or were knowing or reckless (subjective intent); whether the actions of the officer were reasonable; whether or not probable cause existed; and whether or not the actions of the officer were objectively reasonable. See, e.g., Pet. 10, 21.

The shotgun approach of the petitioners attacks, without distinction, both the submission of factual issues to the jury necessary to the determination of liability in a *Franks* claim, and the submission of factual issues necessary to the determination of the qualified immunity issue. *Id.*

[10] *Franks v. Delaware,* 438 U.S. 154 (1978).

law given and the procedure followed by the trial court. *Ham*, 248 Conn. at 527, 529 n.12.[11]

The petitioners nevertheless attempt to twist the well-settled law which a trial court must follow in considering a pretrial dispositive motion based upon qualified immunity in a *Franks* civil case into a rule absolutely barring submission to the jury the factual issues of materiality, reasonableness and probable cause. The petitioners state, utterly without support in, or even citation to law:

> In the civil case, only a trained and experienced judge can reasonably evaluate what omitted evidence another trained and experienced judge might have found so compelling as to

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[11] The Connecticut Supreme Court correctly observed that "the defendants' complaint . . . that the trial court's instruction on materiality was deficient" was "raised for the first time on this appeal." *Ham, supra*, at 527. The court further held:

> The defendants claim that the court failed to give proper guidance regarding the meaning of exculpatory information and materiality. The claim was not raised properly at trial. The defendants expressly informed the court, following its charge to the jury, that they had no objections to the charge. As we have repeatedly stated, issues not properly raised before the trial court will ordinarily not be considered on appeal.

Ham, at 529 n.12.

The Connecticut court expressly did not review, and certainly did not decide upon the trial court's instructions of law regarding the meaning of exculpatory information and materiality. As such, the Court should deny the petition insofar as it requests review of the trial court's submission to the jury on these matters.

> negate guilt and thus lead to the decision to not prosecute, and alternately, what error in the warrant application is nevertheless sufficiently reasonable so as to entitle the accused officer to qualified immunity even if probable cause is found to be lacking after "correction" of the warrant for false or omitted evidence.

Pet. 10.

The petitioners here intentionally blur the distinction between the trial court's determination whether there exists a dispute of material fact to be submitted to the jury, and the jury's determination of facts relevant to liability in the underlying tort. Such faulty reasoning leads to clearly untenable results – if the argument of the petitioners were to be credited, then the determination of whether a *Franks* violation has occurred would *never* be one for the jury, whether or not defendants offer the defense of qualified immunity. If this is not the necessary conclusion that one must draw from the petitioners' argument, how then can their assertion that the *Ham* court erred in submitting factual issues to the jury be explained? The only possible answer is that the petitioners disagree with the **fact-bound** conclusions of the trial court and the *Ham* court based upon the facts found by the jury; first, that the facts found support a finding against the petitioners; and second, that qualified immunity was unavailable to them. *Ham, supra,* at 527.

B. The petitioners incorrectly argue that the standard for a court's consideration of "material facts in dispute" on a motion for summary judgment based upon qualified immunity is the same as the determination of "materiality" in a *Franks* context.

Summary judgment based upon qualified immunity "should be granted only when it is appropriate, that is, when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Smith v. Reddy*, 101 F.3d 351, 357 (4th Cir. 1996). Properly raised on a motion for summary judgment, **if a defendant so elects**, the defense of qualified immunity is a well-settled doctrine that protects government officials from civil suits arising from the performance of their discretionary functions when that performance "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow*, 457 U.S. at 818-19).

The petitioners do not dispute that the right to be free from arrest absent probable cause was clearly established, nor do they contest that the right was one which a reasonable person would have known at the time of their

submission of the affidavit in support of the arrest warrant for the respondent;[12] therefore, the appropriate inquiry is one into the objective reasonableness of the actions of the respondents. *Harlow,* 457 U.S. at 818-19; *Anderson,* 483 U.S. at 639. In order to be entitled to summary judgment on such a defense, the officer must adduce sufficient facts that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiff, could conclude that it was objectively unreasonable for the officer to believe that probable cause did not exist. *Ham,* 248 Conn. at 522, quoting *Golino v. New Haven,* 950 F.2d 864, 870 (2nd Cir. 1991), *cert. denied,* 505 U.S. 1221 (1992), citing *Malley v. Briggs,* 475 U.S. 335, 341 (1986); *Robison v. Via,* 821 F.2d 913, 921 (2nd Cir. 1987); *Mulligan v. Rioux,* 229 Conn. 716, 729 (1994).

When considering a motion for summary judgment based upon qualified immunity, it is appropriate for the reviewing court to determine whether there exist genuine disputes of material facts. In this context, only if "the corrected affidavit did not support an objective finding of probable cause would the factual disputes be material to resolving the issue of probable cause." *Cartier v. Lussier,* 955 F.2d 841, 845 (2nd Cir. 1992). If the court determines that no dispute of material facts exist, then the court may properly grant summary judgment, in effect taking all factual determinations from the jury.

The petitioners rely on the holdings of a scant few cases, wherein summary judgment was granted, and

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[12] See Section D, *infra.*

issues of fact were in effect taken from the jury for the sole purpose of determining the motion, to extrapolate that in all circumstances the issues of materiality, reasonableness and probable cause in a *Franks* analysis, rather than in a summary judgment/qualified immunity analysis in a *Franks* case, are questions of law for the court. The cases cited by the petitioner clearly do not stand for this proposition.[13] In fact, nowhere in the law is

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[13] It is extremely telling that the petitioners quote extensively from the district court's decision in *Smith v. Reddy*, 882 F. Supp. 497 (D. Md. 1995). Pet. 23-24. Although the district court's decision in *Smith*, 882 F. Supp. at 499-500, was upheld on review, the circuit court took great pains to articulate that "we find that Reddy's conduct was objectively reasonable and affirm the summary judgment that granted her immunity. However, we reach that conclusion by an analysis that differs somewhat from the district court's." *Smith v. Reddy*, 101 F.3d 351, 353, 355 (4th Cir. 1996). The court stated:

> The district court held that if a plaintiff alleges that an officer obtained a warrant by misleading a magistrate, the plaintiff must satisfy the subjective standard set forth in *Franks* . . . to overcome a defendant's claim of qualified immunity . . . [which] requires 'a substantial preliminary showing that a [material] false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit' . . . Rather than engaging the *Franks* test, we apply the qualified immunity analysis, which examines the objective reasonableness of an officer's conduct.

Smith v. Reddy, 101 F.3d at 355.

The quoted portion of the district court's opinion offered by the petitioners is excerpted directly from that portion of the court's holding which was expressly determined to be incorrect reasoning by the circuit court. *Smith v. Reddy*, 101 F.3d at 355; *Smith*, 882 F. Supp. at 499-500. The corrected reasoning strongly

there to be found any support for the petitioners' assertion.

Well-settled law instructs that the purpose of qualified immunity is, in effect, to give official transgressors a "second bite at the apple," by allowing for the determination that their actions, although mistaken, were reasonable. To this end, the doctrine of qualified immunity is appropriately considered by the court either before trial, if raised in a pretrial dispositive motion, or after a finding of liability at trial.

In the instant case, the petitioners did not move for summary judgment or to dismiss the respondent's claims prior to trial. The petitioners' claims, therefore, that the trial court submitted the case to the jury in error is without foundation in law or reason. The trial court did, after trial, pursuant to the written motion of the petitioners filed after the trial, consider and reject the defense of qualified immunity. In so doing, the court independently evaluated the materiality of the **facts omitted from the warrant affidavit** (as opposed to the summary judgment question whether material facts were in dispute), and determined that no reasonable police officer could have mistakenly believed that probable cause existed in the corrected affidavit. The standard applied by the trial court, and the de novo review standard applied by the Connecticut court were correct and in accord with well-settled law.

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suggests that the elements of a *Franks* civil claim are properly questions of fact for the jury. *Id.*, at 355.

As such, the cases cited by the petitioners cannot be construed to support the petitioners' assertion that the issues of materiality, reasonableness and probable cause should always be determined by the court in *Franks* civil cases. It is solely with the factual conclusion of the lower courts that the petitioners take issue. Therefore, this Court should decline review of the instant petition.

C. Contrary to the assertions of the petitioners, the courts agree that questions of fact related to liability and qualified immunity in *Franks* cases are properly decided by the jury.

Factual determinations necessary to the determination of qualified immunity are properly submitted to the jury. *Magnotti v. Kuntz,* 918 F.2d 364, 367 (2nd Cir. 1990); *P.C. v. McLaughlin,* 913 F.2d 1033, 1039 (2nd Cir. 1990); *Dube v. State University of New York,* 900 F.2d 587, 595-596 (2nd Cir. 1990), *cert. denied,* 501 U.S. 1211 (1991).

Summary judgment is inappropriate in "doubtful cases" where the court is unsure what weight a neutral magistrate would give the remaining truthful information. *Velardi v. Walsh,* 40 F.3d 569, 573-74 (2nd Cir. 1994). "[R]eview of the "corrected affidavit" . . . where officers procuring a warrant have deliberately misled the magistrate about relevant information [,] . . . [to] . . . try to predict whether a magistrate would have found probable cause if he had been presented with truthful information . . . is a question of fact rather than of law." *Velardi,* 40 F.3d at 574 n.1.

In a § 1983 *Franks* action the issue of whether there was probable cause to make an arrest is a question for the

jury. *Sharrar v. Felsing*, 128 F.3d 810, 817-18 (3rd Cir. 1997); *Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 192 (3rd Cir. 1984). The question is for the jury if there is sufficient evidence whereby a jury could reasonably find that the police officers did not have probable cause to arrest. *Sharrar*, 128 F.3d at 818; *Deary*, 746 F.2d at 192; *Luthe v. The City of Cape May*, 49 F. Supp. 2d 380, (D. N.J. 1999). The objective reasonableness of the officer's actions is an issue for the jury when facts material to the issue are in dispute. *Luthe*, 49 F. Supp. 2d at 389; *Sharrar*, 128 F.3d at 828; *Wilson v. Layne*, 119 S.Ct. 1692, 1696 (1999).

In determining qualified immunity, the jury properly decides all the fact questions, including whether probable cause for an arrest exists and whether the officer acted objectively reasonably. *Hindman v. City of Paris, Texas*, 746 F.2d 1063, 1068 (5th Cir. 1984). It is error for a court to instruct that probable cause for a warrant is absent, and that it does not find the officers credible, and such error is "only a manifestation of the more basic difficulty of not submitting to the jury the factual disputes regarding the warrant." *Hindman*, 746 F.2d at 1067-68.

If the facts are sufficiently disputed to avoid a directed verdict on the issue of an officer's alleged deception, the jury properly resolves issues prior to the court ruling on the affidavit's validity. *Id.*, at 1067-1068.

"[W]here facts relied upon to show probable cause in a § 1983 action [for false arrest] are controverted, they must be resolved by the jury before controlling legal principles are applied." *Garris v. Rowland*, 678 F.2d 1264,

1270 (5th Cir.), *cert. denied*, 459 U.S. 864 (1982); see also *Trejo v. Perez*, 693 F.2d 482 (5th Cir. 1982).

The "question whether the judicial officer issuing the warrant would have done so even without the knowingly or recklessly false statement is one for the jury." *Hill v. McIntyre*, 884 F.2d 271, 275-76 (6th Cir. 1989).

Whether the judicial officer issuing a warrant would have done so even without the knowingly or recklessly false statements included in the warrant affidavit is a question for the jury. *Yancey v. Carroll County*, 876 F.2d 1238 (6th Cir 1989).

The nature of a defendant's conduct, the defendant's state of mind and intent are issues of fact for a jury. *Burke v. Beene*, 948 F.2d 489, 494 (8th Cir. 1991).

Whether an officer deliberately or recklessly included false statements in the affidavit is a factual determination for the jury at trial. *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995).

Whether, despite the authorization of a magistrate, a reasonably well-trained officer could have believed that probable cause for arrest existed is a factual issue for the jury. *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir. 1991); *Haywood v. Nye*, 999 F. Supp. 1451 (D. Utah 1998).

The claims contained in the plaintiff's complaint and the credibility of the parties, when in dispute, are questions of fact for the jury. *Haywood*, 999 F. Supp. at 1451 n.1.

Whether an officer knew at the time a warrant was executed that the warrant was unreliable and that statements contained in the affidavit were uncorroborated "raise[s] a triable issue" of fact for the jury. *Haywood*, 999 F. Supp. at 1461.

Whether, despite the authorization of a magistrate, a reasonably well-trained officer could have believed that probable cause for arrest existed is a factual issue for the jury. *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir. 1991); *Haywood*, 999 F. Supp. at 1461.

The extent of an officer's knowledge about the problems with the investigation is a question of fact for the jury. *Id.* Factual disputes of this nature preclude the court from ruling as a matter of law that the officer's reliance on the arrest warrant was objectively reasonable, requiring denial of summary judgment based upon qualified immunity, and submission to the jury for factual determination. *Id.*

Whether an officer presented evidence of probable cause to the magistrate is a question of fact for the jury. *Kelly v. Curtis*, 21 F.3d 1544, 1555 n.8 (11th Cir. 1994).

D. The law was well settled at the time the petitioners sought the arrest warrant for the respondent.

The petitioners allege that the Connecticut court was incorrect in its statement of the materiality of the information omitted from the warrant affidavit by the petitioners. Pet. 17-20. Specifically, the petitioners take issue with the court's holding that various matters not included in the affidavit " 'were material because they

were facts which 'would likely be given weight by a person considering the question' of probable cause.' "[14] The petitioners assert that this well-settled rule of law "simply does not exist, and . . . certainly was not 'clearly established' " at the time that the petitioners submitted their affidavit in support of the arrest of the respondent, on February 13, 1991. Pet. 18-19.

A review of the disputed phrase, in its original context, is enlightening:

> Whether an item of information is material or not is, in the context of a motion for summary judgment, a mixed question of law and fact. See, e.g., ***TSC Industries, Inc. v. Northway, Inc.***, 426 U.S. 438, 450, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 **(1976)**. The legal component depends on whether the information is relevant to a given question in light of the controlling substantive law. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 **(1986)**. The factual component requires an inference as to whether the information would likely be given weight by a person considering that question. ***TSC Industries, Inc. v. Northway, Inc.***, 426 U.S. at 450, 96 S.Ct. at 2132.

Golino, 950 F.2d at 871 (emphasis supplied).

As is plainly evident, the argument advanced by the petitioners that the standard endorsed by the court was

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[14] The Connecticut court was here quoting the decision of the trial court, which, in turn was quoting *Golino v. City of New Haven*, 950 F.2d 864, 871 (2nd Cir. 1991), *cert. denied sub nom. Lillis, et al. v. Golino*, 505 U.S. 1221 (1992). Pet. 6A.

not "anywhere in effect at the time the warrant application for Mr. Ham was submitted" is groundless. Pet. 18.

Similarly, the law, for the purposes of the qualified immunity question, was clearly established. As the Connecticut Supreme Court observed, "the right of an individual not to be subjected to arrest without probable cause has long been clearly established," *Ham*, 248 Conn. at 523,[15] and, dispositively, "**was not disputed by the parties**." *Id.* (emphasis supplied). The existence of the right was not disputed at trial or on appeal; likewise, the right to be free from arrest absent probable cause is not seriously disputed here.

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[15] See, e.g., *Franks v. Delaware*, 438 U.S. 154, (1978); *United States v. Leon*, 468 U.S. 897 (1984); *Malley v. Briggs*, 475 U.S. 335 (1986).

That the right was clearly established is all the more evident as refined and articulated by one court:

> A more particularized formulation of the right at issue is the right to be free from an arrest based on a warrant that would not have been issued if the officer seeking the warrant had disclosed to the issuing magistrate information within the officer's knowledge that negated probable cause. See *Cartier v. Lussier*, 955 F.2d 841, 845-46 (2nd Cir. 1992); *Golino v. New Haven*, 950 F.2d 864 (2nd Cir. 1991), *cert. denied*, 505 U.S. 1221, 112 S.Ct. 3032, 120 L.Ed.2d 902 (1992); *Magnotti v. Kuntz*, 918 F.2d 364, 368 (2nd Cir. 1990).

Brown v. D'Amico, 35 F.3d 97, 99 (2nd Cir. 1994).

E. Distinguishing "exculpatory" evidence from "impeachment" evidence is inapposite to the issues presented by the petition, and as the claimed issue was not decided by the Connecticut Supreme Court, review is not warranted here.

The petitioners urge a distinction upon this Court between so-called "exculpatory" and "impeachment" evidence. Pet. 14. This issue, raised before the trial court on post verdict motion by the petitioners, was rejected by that court. Pet. 7A. The issue was not raised before the Connecticut Supreme Court, and as such, should not now be reviewed by this Court.[16] *See generally, Ham,* 248 Conn. 508.

The resuscitation of this argument by the petitioners is significant in a number of respects. All of the state and federal cases cited by the petitioners in support of this argument are imported from the criminal context. Pet. 14-17, 14 n.7, n.8, 15 n.9, 16 n.10.[17] As the petitioners

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[16] See footnote 11, *supra.*

[17] The inapplicability of the cited cases is even more marked in the context of the Connecticut state cases which deal with the prosecutorial obligation in the grand jury context. See, e.g., *State v. Couture,* 194 Conn. 530 (1984). In Connecticut, the role of the state grand jury is statutorily limited to investigation, rather than indictment. C.G.S. §§ 54-45 *et seq.*

As the Second Circuit has observed:

> Under Connecticut law, the finding of probable cause by an investigatory grand jury does not seem to establish conclusively that probable cause exists for the arrest: "Investigating grand juries neither **try** nor **condemn** nor **accuse**; they only **inquire** and **report**." *In re Investigation of the Grand Juror into the Bethel*

themselves admit, each of the cases cited articulate only the burden of disclosure to a criminal defendant placed upon the prosecuting authority in the limited contexts of those proceedings. *Id.* The petitioners nevertheless attempt to import, without precedent, the standard for disclosure of information to a criminal defendant by the prosecuting authority at the grand jury and criminal trial phases into the context of the constitutional obligation of an officer submitting a probable cause affidavit. The absence of caselaw in support of this assertion within the *Franks* civil context is strong indication that the argument of the petitioners has no support within that context.

Contrary to the assertions of the petitioners, the court has clearly defined material information in the *Franks* context as "information [which] would likely be given weight by a person considering that question." *TSC Industries,* 426 U.S. at 450. "The weight that a neutral magistrate would likely have given the . . . information [omitted from the warrant affidavit], along with the other information that was concealed or misrepresented, is not a legal question but rather is a question to be resolved by the finder of fact." *Golino, supra,* at 872; *TSC Industries,* 426 U.S. 438. Similarly, whether a magistrate would have found probable cause if [s]he had been presented with truthful information . . . is a question of fact rather than of law. *Velardi v. Walsh,* 40 F.3d 569, 574 n.1 (1994). The holding applied by the Connecticut court in the instant case based upon clearly established law in effect at the

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Police Department, 188 Conn. 601, 605 (1982) (emphasis in original).

Brown v. D'Amico, 35 F.3d 97, 99 (1994).

time the petitioners submitted their affidavit places no "greater burden of disclosure upon law enforcement" as the petitioners claim. Pet. 19. The petitioners had, and law enforcement officers continue to have a constitutional duty to disclose that "readily available exculpatory evidence of which [the officer] had been made aware." *Smith v. Reddy, supra,* at 357; *Torchinsky v. Siwinski,* 942 F.2d 257, 264 (4th Cir. 1991).

As such, this claim by the petitioners does not merit review by this Court.

CONCLUSION

For the reasons articulated above, this Honorable Court should deny the petition in the instant case.

Respectfully submitted,

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